FLORIDA CONTRACT LAW

A Florida Casebook

Complete Edition — All 26 Chapters

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Chapter 1: CONTRACT FORMATION & THE OFFER

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The first seven Chapters of this casebook address the rules on contract formation. One of the main tasks for law students and lawyers is to quickly and properly spot issues. After a short reading of relevant facts, readers should be able to identify that a main issue is a contract-law issue, and from which area of contract law it comes (e.g., formation, damages, defenses). This Chapter explores four discrete topics, two of which are foundational: (1) what are the elements needed to form a contract, and (2) what are the 'components' of the first element – the "offer"? The other two areas addressed are contextual. As explained in the Introduction, readers often lack the

context that prior exposure to law and business would provide. Readers often struggle with unfamiliar terms as well. Rather than leave readers to learn these on their own, we will address many of these alongside the more "black letter" topics. Where possible, the materials are organized into a hierarchy indicative of their relative importance.

First, this Chapter sets forth the four basic elements of contract formation as recognized by Florida case law: (1) offer, (2) acceptance, (3) consideration, and (4) sufficient specification of essential terms. Readers often think of these as "black letter law" which is to be memorized and then integrated into a workable understanding. For some reason, many states identify the fourth element as "mutuality" or "meeting of the minds". Whereas an offer, as well as an acceptance, require some level of sufficient description for laying out its respective bargain, the issue seems to be that as a fourth element, a sufficiently descriptive offer must be matched in the basics by a sufficiently descriptive acceptance. Asked another way, "Does the offer contain enough to be an offer?" "Does the acceptance contain enough to be an acceptance?" Incomplete "offers" may be invitations to enter into negotiations. Incomplete "acceptances" may be inquiries into potentially changing the terms if possible, but not rejecting an offer. But do the terms of a proper offer and a proper acceptance coalesce sufficiently so that it is clear that the parties are thinking of the same transaction?" Florida law sets forth the element of "sufficient specificity of essential terms" rather than mutuality, but if Florida's rules require sufficient description of the intended bargain for the offer and for the acceptance individually and respectively, then having a fourth element must relate to sufficient coalescence of both in comparison (i.e., mutuality). There is some authority, however, for the notion that there is no need for this "fourth element" coalescence where there is valid consideration on both sides. The rules on this fourth element are not very clear, which may explain why many national casebooks (and this one), do not include a separate chapter or major sub-chapter heading for the fourth element. *See LSQ Funding Group, LLC v. EDS Field Services, LLC*, 879 F. Supp. 2d 1320, 1330 (M.D. Fla. 2012). This fourth element is addressed briefly in Chapter VII, Section C.

Next, the Chapter explores the components of the first element[1]: the offer. This too is "black letter law." Generally, the components of an offer are as follows: (1) a current intent; (2) communicated to some offeree (who has to know of the offer); and (3) sufficiently definite and certain terms. Readers should understand that court cases sometimes use different terminology, and sometimes focus on only two elements, or even four. It is simply not possible to demand absolute uniformity in the real world. However, a flexible understanding that these very elements may be described with different words and in different ways, as well as the possible existence of other elements, based on court or jurisdictional peculiarities, is important. Readers

[1] One could also think of the four formation requirements as elements and their respective requirements as sub-elements of formation.

often fret over something from a different case or in a different course outline, because it looks different. More often than not, it is not a true difference but just another way of making a point. Moreover, different courts (and professors) may add or remove elements – this is to be expected. An example of this may prove helpful. Many readers of contract law have heard that minors under the age of majority cannot enter into contracts – legal incapacity. Some judges and some professors treat this as a fifth element of formation. Other judges and professors treat the age requirement as a defense to the enforcement of a formed contract. These authors favor the latter. Readers who ponder tend to figure this out whereas outline-memorizers do not. The duty of the reader is to do both – memorize, but also reflect, organize, question, and ultimately, understand.

Second, it may also be helpful to be aware that the courts often merge formation concepts. Sometimes decisions are not as precise as one would like, and until readers have a solid grasp of the workings and interconnections of formation law, this lack of precision can cause confusion. If any one of the black letter elements of contract formation is missing, there is (usually) no contract. It is not unheard of for a court to address the fourth element – in Florida the "sufficient specificity of essential terms" – but to rule on a different basis: that there can be no acceptance since there was no meeting of the minds on the essential terms. (In other words, is the failure of one of "acceptance," or one of the "meeting of the minds"?) An example at this point may be helpful. What if your neighbor offered to sell you a house on Sixth Street, and you knew that she owned a house on that street and, since you loved it, you agreed? Later, you learn that your neighbor has two houses on Sixth Street, and in her mind, she was selling you the other one? A court could rule that the fourth element was not satisfied. A court could also launch into an analysis that the acceptance (the second element) was flawed because the intent to accept was on a different thing. In short, though the result is the same, the reasoning could differ. Time and practice affords the chance to understand this when it happens. Readers are encouraged at this point to stick with the framework provided in the casebook for purposes of memory and the drawing of important distinctions. The subtleties, nuances, and common misconceptions that occasionally make their way into published case law will become clearer in time.

Another example where thinkers succeed and outline memorizers fail is the jurisdictional split of authority. Some states have a law and the courts apply it *this way*. Other states have a law and the courts apply it *that way*. Left for another Chapter is a discussion of legal formalism, which is contrasted to a more open, holistic approach to contract law. Suffice it to say at this time that the law needs to be understood in context, including the timeframe and the progressive nature of a state or court in question. Some states follow 'the old rule;' others have moved to a more progressive approach. National casebooks present this facet of the law in a very effective way: they present two cases on

one issue (ask yourself why they would do that… to waste your time?), or they include concurring or dissenting opinions that are nonetheless intelligent and well argued. From this, the reader is supposed to glean that the law may be in a state of flux. It then becomes the responsibility of a lawyer to know the position of her state on a particular view of law. As if contract law were not challenging enough, a full understanding requires incorporation of a time dimension as the law is typically in flux. Often, judges of published cases disagree on the state of the law. Their respective shadings of timeframes of the law often clarify the disagreement (e.g., 'old-school' versus 'new-school' thinking).

Third, mastery of contract law requires answering a preliminary question on which law applies. While this will be addressed in more detail in Chapter III, readers are well advised to categorize a fact pattern up front as either dealing with services, employment, and similar (the "common law of contracts") or with the sale of goods (which readers will learn relies most heavily on a specialized body of contract law championed by the authors of the Uniform Commercial Code (or "U.C.C."). Every state but perhaps one has now adopted some form of the Uniform Commercial Code's Article 2 on the sale of goods. Where Florida's adoption of U.C.C. Article 2 speaks, it binds. Where it is silent, other contract law (typically referred to as *the common law on contracts*) applies. If review of Florida State Bar essay exam answers makes one thing clear, the bar examiners expect a characterization of a contracts essay as either "common law" or "sale of goods" at the beginning of the answer, where it belongs.

Fourth, there is a "test" for the first element and its component parts. When deciding whether an offer has in fact been made, whose viewpoint is relevant? That of the offeror, who may be joking, or from the offeree, who may suffer from delusions? Or should the gauge be from some objective source, such as that hypothetical third person, of reasonable intelligence, watching the machinations of an alleged offer unfold? If a person dressed in a clown suit offered to sell you Miami Beach, would you be in a position to accept that offer, and therefore bind the clown (thereby dooming Miami Beach)? What if that clown was a colleague of yours at a circus, offering to sell his car to you for $4,000? Would your answer be different? Why?

Finally, Chapter I addresses an important side issue that is often left unexplained by other textbooks. For those readers who do not come to law school with prior exposure to legal topics and how the legal and judicial systems work, use of unfamiliar legal terms or topics can prove to be extremely frustrating. In an attempt to avoid this problem, this casebook will address some of the more important terms and concepts. For this reason, material for this Chapter includes information on the distinction between legal and on factual questions of law, and on who decides each one. This concept is a common theme that will show itself again in Chapters XIV, XV, and XVI on

integration and interpretation. For now, readers should understand that sometimes the fact-finder, the jury in a jury trial and the judge in a bench trial without a jury, decides a particular issue (as a matter of fact), but in others, the matter is decided by the court (as a matter of law).

1. Contract Formation

JERICHO ALL–WEATHER OPPORTUNITY FUND, LP v. PIER SEVENTEEN MARINA AND YACHT CLUB, LLC
District Court of Appeal of Florida, Fourth District, 2016
207 So. 3d 938

TAYLOR, J.

This lawsuit has its genesis in a lender's failure to fund a $36 million construction loan in 2008. The lender, Jericho All–Weather Opportunity Fund ("Jericho"), and its general partner, Svirsky Asset Management ("SAM"), appeal a final judgment awarding Pier Seventeen Marina and Yacht Club ("Pier 17") damages of $5,158,875.63, plus $2,213,687.58 in prejudgment interest, in Pier 17's action for breach of a Loan Agreement. We conclude that, because the Loan Agreement did not contain a promise by Jericho to fund the loan, Jericho's failure to fund the loan was not a breach of the Loan Agreement. Jericho's failure to fund the loan was a breach of a loan commitment letter, but that was not the agreement Pier 17 sued upon. We therefore reverse the final judgment.

* * *

On appeal, the defendants first argue that the Loan Agreement never became an enforceable contract and that, in any event, the Loan Agreement did not impose any obligation on them to fund the loan. We agree.

[*The court majority addressed two major issues: whether there was a 'second' contract for a loan which would establish liability; and, if so, whether the contract contained a promise to fund the loan in dispute. The majority addressed the former, but based its ruling on the latter. Nevertheless, the court did clearly spell out the required elements for a contract in Florida.*]

Whether an agreement constitutes a valid contract is a question of law subject to a de novo standard of review. *Richardson v. Knight*, 197 So.3d 143, 144 (Fla. 4th DCA 2016). Likewise, a trial court's interpretation of a contract is generally subject to a de novo standard of review. *N. Star Beauty Salon, Inc. v. Artzt*, 821 So.2d 356, 358 (Fla. 4th DCA 2002).

The basic elements of an enforceable contract are offer, acceptance, consideration, and sufficient specification of essential terms. *St. Joe Corp. v. McIver*, 875 So.2d 375, 381 (Fla.2004); *W. Const., Inc. v. Fla. Blacktop, Inc.*, 88 So.3d 301, 304 (Fla. 4th DCA 2012).

* * *

For the foregoing reasons, we reverse the final judgment and remand for entry of judgment in favor of the defendants.

Reversed and Remanded.

Note

One of the most challenging ordeals for first-year students of contract law is getting up to speed on legal terms and legal concepts that are raised in cases but are typically not explained. Readers are then called upon to look these up in a legal dictionary, to learn about them in another course, such as in civil procedure or equity and remedies, or ultimately to glean their meaning by a process akin to osmosis. Luckily, the import of these terms and concepts are not always of primary importance to the study of contract law. These terms and concepts often distract, and in any event readers must master these terms and concepts by the time of graduation and the taking of a bar exam. For this reason, the authors will briefly address some of the more important terms and concepts in the hope of shortening the learning curve as well as to inject some helpful diversion.

In contract law, some questions in a case are questions of fact that are decided by the finder of facts, which is the jury in a jury trial or the court in a bench trial. Other questions are questions of law that a court decides, such as rulings on the admittance or exclusion of evidence. Contract law includes a hybrid where the question is indeed factual (some courts label these as “substantive”) but is deemed to be too complicated for lay persons sitting in the jury box. The case above includes one. Another good example of this is addressed in Chapters XIV, XV, and XVI in integration and interpretation of contracts.

As previously noted, casebook authors always have a reason for including two cases on the same legal issue or for including concurrences and dissenting opinions within a single case. Readers are alerted to the importance of comparison and discerning the reason for what at first glance may appear to be mere redundancy. For example, the law may be in the process of changing from an old view to a newer view, with a dissent either reminding of the old way of thinking or pointing to where the law may be headed. *Important*: most casebooks and may law professors do not directly cover the next topic, but expect students to glean it over the course of their studies. It is, for example, exactly the kind of second-or-third level area of law that catches the unwary and the less diligent on the MBE exam.

Compare the following two excerpts and ask yourself what is different and why.

A. Question of Law

CARLUCCI v. DEMINGS
District Court of Appeal of Florida, Fifth District, 2010
31 So. 3d 245

COHEN, J.

Kevin Carlucci and Susan Taylor challenge the trial court's final summary judgment, ruling that General Order 328.0, as amended by Sheriff Beary, did not create a vested and enforceable contract entitling employees with twenty years of service with the Orange County Sheriff's Office ("OCSO") to a fully paid lifetime health insurance policy. We affirm.

The OCSO employs general orders to provide employees with information and to establish internal guidelines and procedures. In 1998, Sheriff Beary implemented a policy to defray the cost of health insurance for longer-tenured retirees by amending General Order 328.0 to provide:

> Full time Orange County Sheriff's Office employees who retire March 1, 1998 or after and who have 20 years of service with the Orange County Sheriff's Office, and retain their Sheriff's Office health insurance will have the cost of the single high co-pay HMO paid for them by the Sheriff. The retiree may elect one of the other health insurance options and/or cover their dependents by paying the additional cost of that coverage.

General Order 328.0 further provided that the Sheriff "expressly reserves [the] exclusive right to unilaterally amend or cancel Written directives." Appellants do not challenge the Sheriff's right to unilaterally amend or rescind any general order, including General Order 328.0....

The de novo standard of review applies to a trial court's decision to grant or deny final summary judgment. *Demings v. Orange County Citizens Review Bd.*, 15 So.3d 604, 606 (Fla. 5th DCA 2009). The existence of a contract is an issue of law properly determined by the court. *Quaker Oats Co. v. Jewell*, 818 So.2d 574, 576–77 (Fla. 5th DCA 2002)....

* * *

We share the trial court's opinion that the Sheriff's unilateral act of implementing an internal policy that was subject to unilateral amendment or cancellation cannot constitute a contract. *See* Szell, 414 So.2d at 278; *Stough v. Gallagher*, 967 F.2d 1523, 1530 (11th Cir.1992) (applying Florida law). "If

one party has the unrestricted right to terminate the contract at any time, that party makes no promise at all and there is not sufficient consideration for the promise of the other." *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So.2d 216, 218 (Fla. 2d DCA 1981). Hence, without even reaching the contention that the Sheriff's amendment of General Order 328.0 to discontinue the payments constituted legislative action, there simply can be no impairment of contract in violation of Article I, section 10, when the plain terms of General Order 328.0 allowed for unilateral rescission. [citation omitted]…

* * *

Affirmed.

B. Question of Fact

WELBORN v. KEMP

Supreme Court of Florida, Division B., 1939

141 Fla. 89

PER CURIAM.

T.J.Kemp instituted this action of ejectment for lands situated in Marion County, against Welborn and his wife. Welborn interposed a plea of not guilty, and three equitable pleas, alleging the existence of an oral contract between himself and Kemp for the sale of the property to Welborn. It was stipulated between the parties that Kemp owned the fee, and that Welborn was in possession.

Kemp, at the conclusion of all testimony, moved for directed verdict on the grounds that no tender had been made under the alleged contract, and that no contract had been proved. Verdict was directed, giving Kemp possession of the land. From a denial of a motion for a new trial, Welborn brings writ of error.

The existence of an oral contract is a question of fact for the jury, and a charge directing a verdict for the plaintiff should never be given unless it is clear that there is no evidence whatever adduced that could in law support a verdict for defendant. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law. Section 4363(2696), *C.G.50.; McKinnon v. Johnson*, 57 Fla. 120, 48 So. 910; *Cameron & Barkley Co v. Law-Engle Co.*, 98 Fla. 920, 124 So. 814.

The evidence here being conflicting, and admitting of different reasonable inferences, the trial judge erred in directing a verdict for plaintiff, and a new trial should be granted.

It is so ordered.

Notes

1. What is different in *Welborn* that makes it a *jury* question rather than one for the court to decide? Can you think of a reason?

2. Readers who are not yet accustomed to judges' participation in court rulings may not know what *per curiam* means. At the appellate level, where there is more than one judge deciding new or problematic issues, one judge could write the opinion and the other judges could agree with that opinion in its entirety – making it *per curiam*. A judge or group of judges could also disagree with the legal reasoning and therefore would write a *dissent* that takes issue with the *majority opinion* (which is at least one shy of unanimity, but still agreed to by a majority of the judicial panel). In fact, a judge or group of judges may *concur in the judgment*, which means that there is agreement as to the outcome, but not as to the legal reasoning behind the lead opinion. This is not a complete list of how judges on panels participate in group opinions and it is not necessary at this point to know them, but an understanding of these must be acquired at some point in one's legal education.

3. Readers have just been told that there are four primary elements for contract formation:

   (1) An offer,
   (2) An acceptance,
   (3) Consideration, and
   (4) Sufficient specificity of essential terms.

   There would seem to be other requirements for contracts as well. Some readers have heard that one must have legal capacity (a properly functioning brain to form the necessary intent to offer or to accept). Others have heard (and we will address further in Chapter XIII) that contracts need to be in writing. (Readers may recall from the *Welborn* case in this Chapter that an oral contract is in fact possible).

CMM Approach: Rather than treat these as additional *elements*, we recommend the CMM Approach of treating the others as possible *defenses*, at least for the time being. In other words, contract formation

requires that each of the four elements is met. A formed contract may be unenforceable, however, where there is a qualifying defense. We will save for a later time further discussion about the difference between contract formation and defenses to enforcement of formed contracts.

2. Components of an Offer

A. Components of an Offer and Current Intent

LEE COUNTY v. PIERPONT
District Court of Appeal of Florida, Second District, 1997
693 So. 2d 994

CAMPBELL, Acting Chief Judge.

Appellant, Lee County, challenges the amount of attorney's fees awarded appellees, Peter F. Pierpont and Mary J. Pierpont, in an eminent domain action. We reverse and remand for a recalculation of the attorney's fees to be awarded.

The principal issue in this appeal involves the application of section 73.092, Florida Statutes (Supp.1994), to the circumstances of this case. By its terms, section 73.092, as amended in 1994, applies to all actions filed after October 1, 1994. It is, therefore, applicable to this case.
The pertinent parts of section 73.092 provide as follows:

73.092 Attorney's fees.

1) Except as otherwise provided in this section, the court, in eminent domain proceedings, shall award attorney's fees based solely on the benefits achieved for the client.

(a) As used in this section, the term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.

* * *

On January 5, 1995, the county attorney filed a petition in eminent domain to acquire the property needed for the Mid-Point Bridge project, including the property of appellees (Parcel No. 115). Simultaneously with the filing of the eminent domain petition, the county attorney also filed, pursuant to section 74.031, Florida Statutes (1993), a Declaration of Taking and Estimate of Value. The good faith estimate of value contained within the declaration of taking for appellees' Parcel No. 115 was $69,000. An order of taking was rendered on March 10, 1995, and the good faith estimate of $69,000 was deposited into the registry of the court.

On April 3, 1995, appellees, through their attorney, filed an answer to the Petition in Eminent Domain in which they admitted as true all the allegations of the petition, denying only the good faith estimate of value contained within the declaration of taking. By letter dated April 19, 1995, the county attorney communicated to appellees' attorney as follows:

> Dear Bill:
>
> I have received your answer filed on behalf of Mr. and Mrs. Pierpont. From this point on, I will communicate only with you as the representative of Mr. and Mrs. Pierpont.
>
> The 1995 appraisal establishes a $69,000.00 value for the parcel. I am authorized to offer the sum of $82,800.00 as full compensation for the taking of Parcel 115. No further offers will be made and no further negotiations will be entertained. If this sum is unacceptable to your clients, I will set the case for trial. Please advise whether your clients will accept $82,800.00 as full compensation prior to May 15, 1995 at which time the offer will expire.

The $82,800 offer contained in the county attorney's letter was not accepted, and the record discloses that no challenge was made during the proceedings to the authority of the county attorney to make the offer.

The case was ultimately settled by a stipulated final judgment rendered on September 8, 1995, in which the parties agreed that appellees would receive $87,500 as full compensation for their property.
The dispute as to the amount of attorney's fees awarded appellees arises over whether the section 73.092 statutory benefits achieved for appellees by their attorney should be calculated based on the difference between the final judgment amount of $87,500 and the county attorney's offer of $82,800, or the

difference between the final judgment of $87,500 and the good faith estimate of the declaration of taking of $69,000. We conclude that the intent of section 73.092 as to the proper measure of the "benefits achieved" requires that the calculation be based on the difference between the final judgment amount and the amount contained in the offer by the county attorney in his letter of April 19, 1995. We make this conclusion because we do not perceive it to have been the legislature's intent to equate the statutorily mandated "good faith estimate of value" required by section 74.031 with the "written offer" contemplated in section 73.092. If that was the intent, section 73.092 should have made reference to the good faith estimate contained in and required by section 74.031. It does not. On the contrary, section 73.092 uses the specific term "written offer." The good faith estimate is not a "written offer." In fact, the good faith estimate is not even required or a part of a proceeding in eminent domain unless the condemning authority desires to acquire possession of and title to the property prior to entry of final judgment. *See* FLA. STAT. §§ 74.011-.071 (1993).

An "offer" has been defined as follows:

> A proposal to do a thing or pay an amount, usually accompanied by an expected acceptance, counter-offer, return promise or act. A manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement, Second, Contracts, § 24. A promise; a commitment to do or refrain from doing some specified thing in the future. An act on the part of one person whereby that person gives to another the legal power of creating the obligation called contract. *McCarty v. Verson Allsteel Press Co.*, 44 Ill.Dec. 570, 576, 89 Ill.App.3d 498, 504, 411 N.E.2d 936, 942. The offer creates a power of acceptance permitting the offeree by accepting the offer to transform the offeror's promise into a contractual obligation.

See Black's Law Dictionary 1081 (6th ed. 1991). If the "good faith estimate" of chapter 74 was to be considered an "offer," as Judge Blue urges in his dissent, a property owner could immediately file an acceptance of the "good faith estimate" and under the theory of offer and acceptance the condemnor would be bound by the "good faith estimate." Such does not appear to us to be the law, however, in regard to a "good faith estimate." The court in Jacksonville *Expressway Authority v. Bennett*, 158 So.2d 821, 827 (Fla. 1st DCA 1963), addressed the non-binding effect of the good faith estimate and said:

> Upon appropriate pleadings and procedures the condemning authority is entitled to have its own estimate as well as that of the court-appointed appraisers amended or corrected to

> speak the truth. It is also entitled at the jury trial under Chapter 73, irrespective of the amount stated by such estimate or appraisal, to adduce evidence on the issue of compensation to be made to the owner for the taking of his property, even as the owner is entitled to do so. In fine, the guiding light of every proceeding in eminent domain or ancillary thereto is to secure to the owner of the property taken full compensation-to make him whole-nothing less, nothing more.
>
> * * *

We, therefore, reverse the order of the trial court and direct on remand that appellees' attorney's fee award based on benefits achieved be determined based upon the difference between the county attorney's offer of $82,800 and the final judgment amount of $87,500.

PARKER, J., concurs.

BLUE, J., dissents with opinion.

BLUE, Judge, dissenting.

I respectfully dissent because I believe that the good faith estimate of value should operate as an offer once the trial court has ordered deposit in the court registry and title has vested in the condemning authority. It appears that the Fifth District has taken this position without discussion. *See Seminole County v. Rollingwood Apartments, Ltd.*, 678 So.2d 370 (Fla. 5th DCA 1996) (stating without discussion that the trial court calculated the benefit achieved by comparing the amount of the final judgment and the "initial offer/good faith deposit"). This construction of the statute supports the legislative intent of calculating fees based solely on the benefits achieved. Accordingly, I would affirm. To determine if the good faith estimate is an offer, one can consider whether the good faith estimate is an amount that can be accepted by the landowner to settle the litigation. That is, may the landowner agree that the good faith estimate is a sufficient amount of money for the land being condemned, accept that amount in exchange for the land, and thereby end any controversy? If this is not the law, it should be. Unfortunately, I can find no direct precedent to support this last conclusion.

On the other hand, there appears to be no binding precedent that prevents a landowner from accepting the good faith estimate in full settlement once the trial court has ordered the deposit into the court registry and title has vested in the condemning authority. At this point, the right to compensation vests in the landowner under section 74.061, Florida Statutes, and a condemning

authority cannot dismiss the action without the landowner's consent. *O'Sullivan v. City of Deerfield Beach*, 232 So.2d 33 (Fla. 4th DCA 1970).

The majority opinion finds comfort in *Jacksonville Expressway Authority v. Bennett*, 158 So.2d 821 (Fla. 1st DCA 1964). A careful reading of this case does not support the proposition that a landowner is precluded from accepting the good faith estimate as full payment for land taken. Bennett was the fourth appeal in an eminent domain action. *See Jacksonville Expressway Authority v. Bennett*, 124 So.2d 307 (Fla. 1st DCA 1960); *Bennett v. Jacksonville Expressway Authority*, 131 So.2d 740 (Fla.1961); and *Jacksonville Expressway Authority v. Bennett*, 149 So.2d 74 (Fla. 1st DCA 1963). These cases stand for the proposition that the good faith estimate is not binding on the condemning authority's position at trial. This holding does not persuade me on the issue at hand because offers are seldom admissible or binding on a party's position at trial. *See*, e.g., § 45.061 (offers of settlement); § 73.032 (offers of judgment in eminent domain actions); § 768.79 (offer of judgment).

A landowner should be able to rely on the good faith estimate and accept that amount in full settlement for the land taken. I find no reason to expect that this holding would present a roadblock to a fair and efficient exercise of eminent domain powers. If condemning authorities make the estimate in good faith, as they are required to do, they have estimated what they would be willing to pay for the property. Using this written estimate to calculate attorney's fees will only encourage condemning authorities to make realistic estimates. Property owners can then have confidence in accepting the offers without incurring unnecessary legal expenses that drive up the cost of acquiring the land and that are ultimately paid by the taxpayers. In addition, I can envision cases where the condemning authority makes no other written offer, but has filed a declaration of taking with a good faith estimate of value. If the estimate did not provide a starting point for the fee award, the fees might be calculated as a percentage of the total settlement or judgment, thus driving up the costs associated with eminent domain proceedings. *See Department of Natural Resources v. Gables-By-The-Sea, Inc.*, 374 So.2d 582 (Fla. 3d DCA 1979) (approving fee award under earlier version of statute, noting that the attorney had achieved a benefit measured by the ultimate recovery because the condemning authority made a zero offer). Alternatively, the condemning authority could argue that the property owner should be denied attorney's fees because without a written offer there is no measurable benefit.

* * *

Editorial Note: Readers will notice that the majority opinion cites *Jacksonville Expressway Authority v. Bennett* as 158 So.2d 821 (Fla. 1st DCA 1963), while the dissent cites the same reporter and page as (Fla. 1st DCA 1964). Both citations refer to the same opinion; the correct year is 1963. The discrepancy appears in the original published opinions and is preserved here without alteration.

Notes

1. Although it is not feasible to provide a simplified case breakdown with explanations after each case (which is a skill that students must develop), it may be helpful at least this once to demonstrate how this may be done. In the *Lee County* case, the Florida rules on (1) deriving a good faith estimate, and (2) for charging a penalty where the government entity low-balls an offer made to a landowner are helpful to frame the point being made but are not what needs to be learned at this juncture. The point is that some things are offers directed at a particular party for acceptance, and some things are not so intended.

   The case involves a state statute requiring government entities that are purchasing private land by exercising eminent domain to provide a good-faith estimate of the land's value. *See* FLA. STAT (2017) § 74.031. The good-faith estimate is made to the state, and is reviewed by the courts, as an initial step to an exercise of eminent domain. A *different* statute, *see* FLA. STAT (2017) § 73.092, calls for the government entity to make an offer to the private land owner, with a penalty for failure to make a fair offer. The penalty is that the government entity would have to pay attorney's fees on the amount calculated as the difference between the final judgement value and the value that the government entity made its offer (*not* from its good faith estimate, which came earlier). If you think about it, the good faith estimate is made to the state as a prelude to the state entity's development of the first intended offer. The penalty statute utilizes the amount that the government entity actually offers the landowner. There is no intent of making an offer to the landowner by the initial estimate and this is why the landowner failed in the *Lee County* case. In contrast, the offer price made to the landowner demonstrates a current intent of an offer directed at the land owner. The good faith estimate is not intended for the land owner to accept, and is therefore not an "offer." On the other hand, the actual offer price made in the attempt to settle is an "offer" containing all of the requisite components.

2. There is a dearth of Florida case law on one of the traditional 'components' of an offer, i.e., that the requisite intent must be *current* rather than *future*. National casebooks cover this requirement, and readers should make sure to include it in their "black letter law." The

reason why there is not much case law in Florida on point is that the requirement is so obvious that cases on it are most likely resolved before reaching the point of publication in an appellate-court opinion. Readers may want to ask themselves whether there is a difference between, "I will sell you my guitar for $500," and, "I am thinking of selling my guitar for about $500."

3. Probably because cases involving the "communication" component of an offer do not lead to complicated analyses that make their way to appellate courts, there is also not much case law in Florida on this second component of an offer. It is nevertheless one of the "black letter law" requirements of an offer and tends to arise in unilateral contract situations of reward. Further, the issue usually arises when an offeree argues the right to collect a reward (rather than a defense by the offeror that the offer was never communicated). This is the format pursued in the *Kolodziej* case excerpted in Chapter 2. *Kolodziej v. Mason*, 996 F. Supp. 2d 1237, 1248-49 (M.D. Fla. 2014).

4. State approaches to the components of an offer and to the elements of a contract are basically the same, but how state courts shape the law may differ. For example, many states include a specific "certainty" requirement for something to constitute an offer. *See* RESTATEMENT (SECOND) CONTRACTS § 33, ch. 3 app. (2017) (*see also id.* cmt.). Students of property law are exposed to the requirements of identification of the parties, a description of the real property, and the price as minimum requirements of an offer to sell (or an offer to purchase) real estate. Florida courts seem to skip over this requirement of the offer component in favor of focus on the appropriate confluence of the terms of the offer and acceptance. *See, e.g., Martin v. Jack's Yanks Const. Co.*, 650 So. 2d 120, 121 (Fla. Dist. Ct. App. 3d 1995). This may explain Florida's use of "essential specificity of essential terms" rather than "mutuality" or "meeting of the minds," which is the basic fourth element of contract formation. The fourth element is discussed further in Chapter VII, Section C.

B. Objective Intent

MED–STAR CENTRAL, INC., v. PSYCHIATRIC HOSPITALS OF HERNANDO COUNTY, INC.
District Court of Appeal of Florida, Fifth District, 1994
639 So. 2d 636

THOMPSON, Judge.

Med–Star Central, Inc. ("Med–Star") appeals the final summary judgment

entered in favor of Psychiatric Hospitals of Hernando Co., Inc. ("Psychiatric Hospitals") on its breach of contract claim. We reverse.

[…] The undisputed facts show that representatives of Med–Star and Psychiatric Hospitals signed a document titled "Transport Proposal." The purpose of the document was to allow Med–Star to be the exclusive transporter of Psychiatric Hospitals' patients. The document was submitted in response to an invitation from Psychiatric Hospitals for proposals for a contract to transport patients. After the representatives signed the document, it was notarized in their presence. The document was signed on 18 December 1990 and Med–Star provided exclusive transportation for Psychiatric Hospitals until 15 February 1991. The document identified the parties and listed the liabilities and rights both parties "shall" have under the agreement. It provided that the agreement "is an independent contract relationship between the parties." It also provided that the agreement would bind the parties for a minimum of 12 months and provided the method of cancellation. The document also established rates for transportation and a payment schedule for services rendered and the amount of interest charged for overdue payments.

* * *

Although the document had all the elements of a contract: an offer, an acceptance and consideration; there was an ambiguity which prevented the trial judge from granting the motion for summary judgment. *See Gibson v. Courtois*, 539 So.2d 459, 460 (Fla.1989); *Graf v. Liberty Mutual Ins. Co.*, 636 So.2d 539 (Fla. 5th DCA 1994) (holding that trial court erred in granting summary judgment on issue of whether document was a contract or a receipt where document could have been interpreted either way and ambiguity in that regard made it unclear whether there was a meeting of the minds, which is a requirement for a valid contract, thus, issues of fact were raised which should not have been resolved by summary judgment). The only ambiguity in the proposal relates to whether the proposal was meant to be a binding contract when signed. Psychiatric Hospitals' contention is that it did not intend to enter into a binding contract, however, their subjective intent is not material in determining whether a contract was made. *Jackson v. Investment Corp. of Palm Beach*, 585 So.2d 949, 950 (Fla. 4th DCA 1991).

> [T]he test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Id. (citing 1 Williston on Contracts § 94, 339–340).

A reasonable person, in the position of Med–Star, could have thought that by signing the proposal, Psychiatric Hospitals accepted its offer and meant to be bound by its terms. *Jackson*, 585 So.2d at 960....

We reverse the summary judgment and remand for proceedings consistent with this opinion because there is a genuine issue of material fact.

Reversed and Remanded.

Notes

1. The quintessential case included in other casebooks is *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (1954). The case involved two neighbors who went back and forth over sale of some land for years. One night after some drinks the owner wrote up a contract of sale on a cocktail napkin as the parties bantered back and forth over whether the owner would or could sell the land in question. When faced with a contract enforcement action, the owner claimed that it was all a joke. The court ruled that objectively viewed, the owner had made a valid offer containing the requisite current intent.

2. There is a difference between an intent to have another accept a proper offer on the one hand, and the desire to get things started but have the other side make the offer. This is the difference, for example, between "I'll sell you my motorcycle for $5,000" and "Would you consider paying me $5,000 for my motorcycle?" This distinction is important. In the first, the maker is bound by the terms if the other party properly accepts. In the second, the person making the offer switches to the other – to which offer the first party may accept, reject, or counter-offer. This is great way for good negotiators to maintain flexibility and not get locked into a binding contract before garnering further information. Put another way, one can offer to sell real estate (seller is offeror), or one can offer to purchase real estate (buyer is offeror). Another example of this distinction is implicit in the rules on auctions. Florida has adopted U.C.C. Article 2's § 2-328 in its entirety. *See* FLA. STAT. § 672.238 (2011). For some reason, this concept seems to become more complicated than it needs to be.

CMM Approach: With regard to U.C.C. § 2-328 auctions, we recommend a shorthand CMM approach, albeit at the risk of some oversimplification. Treat an auctioneer's consecutive statements of price as the offer where there is no reserve and the item must be sold at whatever price the item last reaches. *Id.* at 672.238(2). In contrast, where there is a

reserve such that the auctioneer may withdraw goods from sale, treat the last highest bid as the offer, which the auctioneer can accept or reject, until another bid is placed or the item is withdrawn. *Id.* at 672.238(3). Do you note the difference between these two? In the first, the auctioneer is the offeror. In the second, the last highest bidder is the offeror and the auctioneer is the offeree. National casebooks include cases such as *Beard Implement Co. v. Krusa*, 208 Ill. App. 3d 953, 567 N.E.2d 345 (1991), to highlight this distinction.

C. What is Usually Not an Offer

(1). Advertisements

JACKSON v. INVESTMENT CORPORATION OF PALM BEACH
District Court of Appeal of Florida, Fourth District, 1991
585 So. 2d 949

DOWNEY, Judge.

Jackson appeals from a judgment entered upon an adverse jury verdict in his suit to recover from appellee the balance of an advertised jackpot at appellee's dog track.

The underlying factual scenario appears to be that Jackson read an ad in the Miami Herald which stated that the Pic–6 Jackpot for the last evening of the racing season would be $825,000. Jackson attended the track on that date and picked the winner in the six designated races and won the jackpot. The controversy arises because appellee intended the amount of the jackpot to be $25,000, but the advertisement in the Miami Herald stated $825,000. The mistake came about because the newspaper employee who prepared the final draft of the ad mistook appellee's draft thereof to state $825,000 instead of $25,000. Appellee had written on the face of a prior ad, "Guaranteed Jackpot $25,000 Must Go Tonight." The newspaper employee mistook the dollar sign with only one slash-mark to be the number 8 and thus, the eight hundred thousand dollar error! Appellee paid Jackson $25,000 on the night of the races but Jackson later claimed the balance, which led to this suit. At trial, the evidence made it apparent that appellee never intended to offer a jackpot of $825,000; it was clearly a mistake. While Jackson contended that appellee was negligent in the draft preparation of the ad presented to the newspaper, his theory of recovery was that the advertisement constituted an offer, which he accepted, and thus he was entitled to recover. Appellee, on the other hand, contended that there was no valid offer because it never intended to make the offer included in the published ad. Furthermore, if the circumstances constituted an offer, appellee contended it revoked the offer prior to Jackson's acceptance. Finally, appellee argued that the facts did not give rise to a

contract involving an offer and an acceptance. Rather, appellee argued, the ad constituted simply an "invitation to bargain," which does not give rise to a completed contract upon acceptance by the other party.
The sole point on appeal is that the trial court erred in instructing the jury as follows:

> The issue for your determination is whether, as the Plaintiff claims, the Defendant Palm Beach Kennel Club intended by its advertisement in the Miami Herald to make an offer to make a guaranteed jackpot of $825,000 to whomever won the Pic–6 bet on April 25th, 1987. If the greater weight of the evidence does not support the claim of John Jackson that the Palm Beach Kennel Club intended by its Miami Herald advertisement to make an offer to pay a guaranteed jackpot of $825,000 to the winner of the Pic–6 bet on April 25th, 1987, then your verdict on the claim of John Jackson for breach of contract should be for the Defendant Palm Beach Kennel Club.

Jackson argues that said instruction over his objection was tantamount to a directed verdict because there was no evidence adduced that appellee intended the jackpot to be $825,000. Jackson concedes that appellee never intended the jackpot to be the larger amount. The point is that appellee's subjective intent was not material in determining what the contract was between the parties. As the Florida Supreme Court said in *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla.1957), quoting from Justice Oliver Wendell Holmes:

> *The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.* (Emphasis added.)

Professor Williston, in his work on Contracts, describes the test as:

> [T]he test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

1 Williston on Contracts § 94, 339–340.

It appears to us that the law, applicable to offers of a reward, is also applicable to the type of advertisement involved in this case. The offer is a mere proposal or conditional promise which, if accepted before it is revoked,

creates a binding contract. *Shuey v. United States*, 92 U.S. 73, 23 50.Ed. 697 (1876); 67 Am.Jur.2d, Rewards § 15. The evidence presented and the legal contentions asserted below created a question for the jury whereby they could have resolved the case had it not been for the preemptive instruction given relative to appellee's intent in publishing the advertisement in its existing form. *See* Restatement of Contracts 2d § 46 (1981), regarding revocation of a general offer.

We have given due consideration to appellee's argument regarding the advertisement as an "invitation to bargain," but find it inapposite here. The "invitation to bargain" rule appears to be applied in advertising wherein:

> Neither the advertiser nor the reader of his notice understands that the latter is empowered to close the deal without further expression by the former. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear.

1 Corbin on Contracts § 25 (1963) (footnote omitted). Here, there are no further negotiations indicated. If a member of the public buys a winning ticket on six races, he has accepted the offer and the parties have a contract. We thus hold that the trial court erred in instructing the jury as it did regarding appellee's intentions and we reverse the judgment appealed from and remand the cause for a new trial.

WARNER, J., concurs specially with opinion.

HERSEY, C.J., dissents with opinion.

WARNER, Judge, concurring specially.

The issues addressed by the dissent are the very issues on which appellant sought to charge the jury. The appellant's position at trial was that intent was not the issue, because it was clear that appellee had not intended to make an offer of $825,000. The issue was one of mistake and whether or not appellee could be relieved of the mistake made by the Miami Herald or whether appellee itself failed to use due care in the placement of the advertisement. The appellant was effectively denied any opportunity to argue his case on this issue under the instructions used by the court. That is why I cannot conclude that a harmless error analysis is acceptable, especially when the appellee never moved for a directed verdict on these issues, nor was a directed verdict requested on the ground that the evidence was insufficient to show lack of due care on the part of appellee. Had it been, I would agree with the dissent, but

because these issues were not properly raised below I concur in the majority opinion.

HERSEY, Chief Judge, dissenting.

As the majority points out, the test of whether there has been that "meeting of the minds" that is essential to the formation of a contract is an objective rather than a subjective one. In the words of Justice Oliver Wendell Holmes, again as noted by the majority, whether the parties have entered into a contract depends "not on the parties having meant the same thing but on their having said the same thing."

It is clear on the facts of this case that appellee intended to offer a jackpot of $25,000. As recited by the majority, "Appellee had written on the face of a prior ad, 'Guaranteed Jackpot $25,000 Must Go Tonight.' " Thus, what appellee intended and said was the same: a jackpot of $25,000. It was the newspaper whose employee made the $800,000 mistake, not appellee. If I place an advertisement that I wish to sell my Chevrolet for $5,000, can the newspaper sell my Cadillac or my Chalet for $5,000? More to the point, can the newspaper bind me to a contract to sell my Chevrolet for $500? $50? $5? I think not. And if not, the question should surely not be left to the vagaries of a jury trial.

I would affirm based upon the foregoing analysis and structure that affirmance either upon harmless error or a right for the wrong reason hypothesis.

I therefore respectfully dissent.

ON MOTION FOR REHEARING PER CURIAM.

Denied.

DOWNEY and HERSEY, JJ., concur.

WARNER, J., concurs specially with opinion.

WARNER, Judge, concurring.

It appears that the motions for rehearing are directed at the language I used in my concurring opinion in this case. Therefore some elucidation is necessary.

In this case, the majority opinion in which I concurred held that it was error to instruct the jury that the issue in this case was whether or not appellee intended by its newspaper advertisement to offer a jackpot of $825,000. The

opinion pointed out that it was clear that appellant had not subjectively intended to offer the large jackpot. Therefore giving of the instruction was tantamount to a directed verdict in favor of appellee. Despite what appellee's motion for rehearing states, nowhere in my concurrence did I "overlook" that the Kennel Club never offered to pay $825,000. Their entire defense was based on that fact. What is not so obvious is whether through a series of errors and sloppiness it allowed the publication of the $825,000 advertisement.

The dissent's thesis was that appellee made no mistake and submitted an ad for a $25,000 jackpot. Only through a mistake by the newspaper alone was the ad printed for $825,000. The point of my concurrence was to challenge that view of the evidence. Appellant's entire claim was that the mistake made was a unilateral mistake caused by lack of due care on the part of the appellee in failing to properly present the ad for publication and failing to properly proofread it. Appellant claimed that where he relied on the ad to his detriment (by paying admission to the Kennel Club), relief from such a unilateral mistake could not be granted. The jury instruction, focusing on the subjective intent of appellee, precluded appellant from addressing the issue of mistake.

Appellee also challenges my concurrence on the ground that I was wrong that it had not moved for a directed verdict on the issue. I have read all of the argument on the lengthy motion for directed verdict. Appellee never moved for a directed verdict on its affirmative defense of unilateral mistake, which is in reality an equitable ground for rescission of a contract. *See Maryland Casualty Co. v. Krasnek*, 174 So.2d 541 (Fla.1965). Although the appellee requested and received a directed verdict on the negligence count, it was not based on the lack of due care argument. In fact counsel for appellee stated at trial:

> Quickly put, it's a count for negligence, therefore it must establish a duty, breach of duty, legal cause and damages. Focusing on the damage question, because I think it's the clearest, we could talk about the duty of Mr. Colton to the reader of an advertisement but I won't. Let's talk about damages. (R 513).

Then after appellant's argument, appellee's counsel rebutted, saying:

> I haven't got into talking about whether there's a sufficient quantum of proof of negligence. I'm saying the negligence count should not go to the jury because there's been no proof of damages.

The court then granted the motion for directed verdict on the damage argument, not on the issue of no negligence. Therefore, the trial court was

never asked to assess the evidence regarding whether or not appellee was negligent or failed to exercise due care in the placing of the advertisement. There was a dispute in the evidence, and appellant is entitled to present his case to a jury under proper instructions.

Notes

1. Readers have learned that there must be a proper offer as well as a proper acceptance for a contract to be formed. The elements of a proper acceptance are set out in Chapter 2. There is the question, however, of how that intent is judged? Is it based on what the recipient thinks? Or is it based on what a reasonable third-party observer would think, were she to be listening to or reading a possible offer or a possible acceptance? (Side note: even in contract law, as in tort law, use of words like "reasonable" or "objective" often indicate the right answer.)

2. Is there ever a case where an advertisement may be a binding offer that can be accepted and not just an offer for others to enter into further negotiations? The answer is yes, where the advertisement is clear enough on the 'who,' the 'what,' and the 'how.' It is the difference between "Sale on tires – best prices in town," versus "Free fourth tire with purchase of three new Pirelli 'road shredder' tires size L-32 or L-33 for the first 10 customers." For test-taking purposes, focus should be on how complete the advertisement is – the more complete, the more likely it is a binding offer that may be accepted. National casebooks often cite *Lefkowitz v. Greater Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689 (1957), for this premise.

(2). Preliminary Negotiations (Other Than Advertisements)

JOHN I. MOSS, INC. v. THE COBBS COMPANY, INC.
District Court of Appeal of Florida, Third District, 1967
198 So. 2d 872

HENDRY, Chief Judge.

Appellant who was plaintiff below seeks reversal of a judgment for appellee-defendant entered in a non-jury trial after the court granted defendant's motion to dismiss the complaint with prejudice at the close of plaintiff's evidence. Defendant's motion for leave to withdraw its counter-claim was granted and the counter-claim was withdrawn with prejudice.

The plaintiff in the complaint alleges that it submitted to the defendant a franchise application together with the sum of $7,500.00. A copy of the application was attached to the complaint. The application provides that the information is requested solely for the purpose of evaluating applicant's qualifications as an owner of a Cobbs Country Restaurant and Gift Shoppe. The $7,500.00 enclosed with the application represents the franchise fee. If the application was not approved, the money was to be refunded. The terms of the franchise are not included in the application, however, the application provides:

> 'Site must be approved by franchisee, approval not to be unreasonably withheld. Franchise agreement must be mutually acceptable to both parties.'

The plaintiff further alleges in the complaint that the franchise agreement was not acceptable and a demand for the return of the $7,500.00 was refused, wherefore plaintiff demands judgment in the sum of $7,500.00 plus interest and costs.

The defendant in its answer alleges that the refusal on the part of the plaintiff to consummate his agreement with the defendant was arbitrary, capricious and unreasonable and that plaintiff's statement that the franchise agreement was not acceptable to him was in bad faith. The defendant further alleges that it was willing to meet every reasonable objection of plaintiff but plaintiff could not be satisfied. Defendant filed a counter-claim for a sum in excess of $5,000.00 for money expended in preparation for the business applied for in the franchise application.

Plaintiff's evidence at the trial consisted of the testimony of its president, John 1. Moss. Mr. Moss testified that he executed the franchise application on August 6, 1965, in the presence of representatives of the defendant. He requested a copy of the franchise agreement but the representatives did not have one with them. Further, since there was no indication where and when a site might be chosen or discussed, Mr. Moss requested that something be put into the application to that effect. The language quoted above was typed in on the application and agreed upon. Mr. Moss further testified that he wanted to withdraw his application for personal reasons.

* * *

The rule that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement is well recognized. However, 'if the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet

been made; and the so-called 'contract to make a contract' is not a contract at all.'

In *Hansen v. Catsman*, 371 Mich. 79, 123 N.W.2d 265 (1963), the Supreme Court of Michigan affirmed a lower court's determination that an agreement prepared by the plaintiff was unenforceable where it provided that defendant contemplated erecting a building for use as a drug store and contemplated leasing said building. Approximate dimensions were set forth in the agreement which further provided building 'to be erected in accordance with plans and specifications and design not as yet formalized.' An additional stipulation was: '(P)rovided that said plans, specifications and design are acceptable to both parties that a lease shall be entered into between the parties.' The agreement also provided that if for any reasonable reason the plans, etc., are not acceptable to either party the $1,000.00 good faith money shall be returned. The Michigan Supreme Court held that because the agreement left several essential terms for further negotiation that it lacked the basic certainty which, under settled principles, is required before sanctions may be imposed.

An application for admission into a home for elderly women was one of the documents under consideration in *McGinnis v. Enslow*, 140 W.Va. 99, 82 S.E.2d 437 (1954). A portion of the syllabus by the court indicates its holding:

> 'The execution of an application form, in which the applicant agrees to convey all of her property upon admission to a semi-charitable institution, in return for life-time support and maintenance, which form does not embody the amount of the admission fee, the specific amount she is to receive as income, or the fact that the applicant is to make a test visit, without obligating the applicant to enter or the institution to accept her, does not constitute a binding contract, but is merely a preliminary negotiation of the terms of an agreement which, both parties being willing, will be entered into at some later date.'

The proof submitted by plaintiff below shows that the application was not an enforceable agreement binding the parties to enter into the franchise agreement, but merely preliminary negotiations leading to an agreement. The application contains none of the terms of the complex franchise agreement. A few of the essential terms to be agreed upon were the duration of the franchise and the franchise royalty fee. The franchise agreement was not furnished to the plaintiff at the time he signed the application nor is there any evidence that its essential terms were discussed and agreed upon. On remand, the defendant may bring forth evidence to the contrary when it presents its case.

We hold that the court erred in granting defendant’s motion to dismiss and rendering judgment in its favor. The evidence submitted by the plaintiff warrants a recovery of the money paid on account of a contemplated agreement which was not executed. Since we have determined, on this state of the record, that there was no agreement, it is unnecessary to consider whether plaintiff acted in good faith in refusing to execute the franchise agreement. Accordingly, the judgment appealed is reversed and the case remanded for further proceedings. The order granting defendant’s motion to withdraw its counter-claim based on the judgment is also reversed and the counter-claim reinstated.

Reversed and remanded.

Note

Nationally-oriented casebooks include cases such as *Pft. Roberson Inc. v. Volvo Trucks North America, Inc.*, 420 F.3d 728 (7th Cir. 2005), for the premise that multi-faceted offers intending an all-or-nothing acceptance must be accepted *in toto* and therefore that their individual parts may not be accepted piecemeal. (Technically, this is a condition to an offeree’s ability to accept). The same is true in Florida, although the courts appear to justify their rulings on the basis that parties were still in the preliminary negotiations phase of contracting. In *Andrews v. Frey*, 66 So. 3d 376 (Fla. Dist. Ct. App. 5th 2011), *disapproved on other grounds* in *Audiffred v. Arnold*, 161 So. 3d 1274 (Fla. 2015), the court ruled that offers seeking settlement of multiple defendants were neither ambiguous nor joint offers, and therefore required acceptance by the offeree of settlement as against all plaintiffs. *Andrews*, 66 So. 3d at 378-79. The reason for the subsequent disapproval was not that a multi-faceted offer requires an all-or-nothing acceptance, if such is the intent. Rather, the Florida Supreme Court interpreted Florida's 'offer of judgment' statute and court rules, which focus is the authorization of attorney's fees where a defendant fails to accept a settlement offer. Therefore, the disapproval was based on the issue of statutory and court rule attorney's fees rather than the need of an offeree of a multi-faceted offer to accept all aspects collectively or not at all. Stated another way, removing the interplay of statutes and court rules, the premise regarding all-or-nothing offers remains valid. *See also Webster Lumber Co. v. Lincoln*, 115 So. 498 (Fla. 1927) (where a majority of the Supreme Court ruled that a barrage of letter negotiations between a business in Florida and private land owners residing in Massachusetts did not establish a binding contract).

The Multistate Bar Exam tests fact patterns with an all-or-nothing intent. The confusing part is that a court could justify its ruling on at least three different bases: (1) that the parties are still engaged in preliminary negotiations (i.e.,

no offer yet), (2) that there was an improper acceptance (i.e., acceptance not in accord with the offer's requirements is not a valid acceptance), or (3) that the parties failed to have the requisite meeting of the minds (i.e., in Florida, the failure of accord on essential terms). Sometimes cases include the elements but are not particularly clear on which one(s) led to the result.

Judges and law professors sometimes take for granted that readers arrive to the study of contract law without the kind of context that ensures a timely understanding of the materials. A common recommendation is that readers work as hard as they can until things 'click.' Casebooks tend to drop readers into the middle of an ongoing timeline without necessarily explaining every facet of contract law involved in a case. To the trained mind, the answer is obvious and does not require a careful explanation. A seemingly small difference in facts often makes one of the elements the most relevant. With time and hard work, the pieces ultimately fall into place for those who persevere. The following three examples may help to illustrate this point.

Problem 1-1

Manufacturer sends Retailer a letter indicating its wish to build a new plant near to Retailer's location. To do so, Manufacturer indicates that in order to make this economically viable, it would probably need the following: (1) Retailer to commit to the purchase of a minimum level of purchases for its the new plant, (2) Retailer to hire and pay Manufacturer's delivery division for the delivery of the products, and (3) Retailer to be required to hire Manufacturer's repair division for any repairs that it or its customers would request under a manufacturer's warranty. Tentative prices and volume discounts for each of these aspects were included. By overnight mail, Retailer mails a precipitous, "We accept the purchase levels and prices for products if you build a nearby plant." Is there a contract? If not, why not? The answer can be found in this Chapter.

Problem 1-2

Manufacturer sends the same letter as in Problem 1-1. Retailer writes back that it can agree to (1) and (3), but that to save money, it would use its own under-utilized trucks for transport. Manufacturer responds that the project would not be economically viable unless Retailer agreed to all three requirements. Retailer writes back, "We accept (1) and (3)." Is there a contract? If not, why not? Some confusion is to be expected here, because based on the different facts, the answer is something to be covered in Chapter II – can you glean which element?

Problem 1-3

Manufacturer sends same letter as in the last two problems. Retailer loves Manufacturer's product, which it has been using for almost a decade. Retailer promptly accepts. Unclear from the correspondences up to this point is the fact that Manufacturer would use this opportunity to retool for a new design. The new design would not work for Retailer based on its market. Once Retailer learns of this, it notifies that it cannot go through with the deal. Manufacturer sues. Is there a binding contract? If not, why not? Which element seems to be the problem here? Is the element involved here addressed in this casebook to any significant degree?

(3). Others: Statements of Opinion, Puffing, & Social Invitations

The intent behind an opinion is usually a non-binding one. The statement, "I think that by the time I operate your leg will be as good as new," carries with it a much different intent than, "If you let me operate on your leg I guarantee that you will not only walk again but will be able to dance, even to jog." The former is hopeful of a good result, whereas the latter promises a specific and measurable result. The law treats these two very differently. The former is not an offer that may be accepted.

Like statements of opinion, somewhat vague but positive statements are not intended to be binding ones. In fact, no reasonable person hearing or reading such statements would believe that the other party was promising a particular quality or result. For example, "This car is in A-1 condition" should be treated very differently from a promise to fix "anything at all that goes wrong within the first three months after the sale of the car – even the tires." Which of the following would be puffing, and which would be binding?

(i) "You won't find a better Florida casebook on contracts law out there!"

(ii) "If you read this book cover-to-cover and do the problems in it, you WILL pass the Florida Bar Exam or your money back."

(iii) "This (used) coffee maker will still give you at least years of faithful service – guaranteed!"

Nota bene: in example (iii) above, the promise was qualified by the word "used." Can you think of a reason why?

In some cases, statements of opinion may be binding. The key is the nature of the statement coupled with the nature of its maker. If an expert such as a plastic surgeon makes clear promises of obtaining a particular result, some courts may find that such promises are definite enough to be binding. Discussions with former law students over this very issue may prompt

references the “hairy hand” case. *See Hawkins v. McGee,* 146 A. 641 (N.H. 1929).

Invitations to social events typically do not expect a return promise of attendance. Not that attempts to collect for a no-show have not been tried. *See Party Invoice: Boy Sent Bill for Birthday No-Show*, BBC NEWS, http://www.bbc.com/news/uk-england-cornwall-30876360. It is possible that a very specific invitation indicating some negative result for not attending might be upheld as a potentially binding offer. To follow up on this possibility, however, would require contemplation of the nature of the acceptance expected and/or whether silence can act as an acceptance which is addressed in Chapter 3.

There are other examples of “non-offers.” Rather than set out an exhaustive list, readers are encouraged to keep in mind that problems with any component of “offer” may nullify its making. For a social contract or an opinion, there is (usually) never a binding intent behind it (but one could work out an example of where there would be). Here is another general rule: Private advertisements for a unilateral contracts (rewards, for example) must be communicated – if the offeree does not know about the offer but performs, she is still typically not entitled to the reward. On the other hand, if the offer is a public one made by a governmental entity, courts are likely to uphold the right to reward even if the performer learns of the offer *after* performance.

3. Communicated

WEBSTER LUMBER CO. v. LINCOLN

Supreme Court of Florida, 1927

94 Fla. 1097

CAMPBELL, Circuit Judge.

[The opinion contains numerous exhibits which, collectively, were asserted as properly identifying land to be sold whereas the other party argued that no

contract was formed for failure of properly definite identification of the property].

* * *

As we view it, the case may be determined in this court by the answer to the following question:

'Do the allegations of the bill of complaint, and the exhibits thereto attached and made parts thereof, set forth a valid, subsisting contract between the complainant and the respondent, for the purchase by the complainant and the sale by the respondent of the land described therein?'

The portion of the bill of complaint quoted above gives the complainant's contention as to the terms and meaning of the alleged contract entered into by the parties, through the correspondence attached to the bill as exhibits. If the correspondence relied upon and made parts of the bill reveal such a meeting of the minds, as contended for by the complainant in its interpretation thereof as quoted above, then the allegations of the bill and its exhibits, as a whole, would show a valid, subsisting contract.

This court has held that a complete contract may be gathered from letters, writings and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that they may be fairly said to constitute one paper. *Meek v. Briggs et al.*, 80 Fla. 487, 86 So. 271; *Tucker v. Gray*, 82 Fla. 351, 90 So. 158; *Gautier v. Bradway*, 87 Fla. 193, 99 So. 879; *Simons v. Tobin*, 89 Fla. 321, 104 So. 583.

We must look to the correspondence, which it is alleged in the bill contains the contract, to determine whether or not there was a binding contract between the complainant and the respondent for the purchase and sale of the land described.

The appellee contends that the correspondence does not give a sufficient description of the land, which complainant claims was agreed to be sold, and that for this reason the decree of the court below was proper. As to this contention, we are of the opinion that the general description contained in the letters shows a particular tract, as distinguished from others in the minds of the parties, in these negotiations, and under our holding in the case of *Lente v. Clarke*, 22 Fla. 515, 1 So. 149, and *Simons v. Tobin*, *supra*, the description in the correspondence was sufficient. We shall therefore undertake to determine whether the correspondence shows a contract, or does it reveal only negotiations between the parties, for the sale of the property therein referred to, by the respondent to the complainant.

In order that there be a contract, the parties must have a definite and distinct intention, common to both, and without doubt or difference. Until all understand alike, there can be no assent, and therefore no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. 13 C. J. pp. 263, 264; *Strong, etc. v. Baars*, 60 Fla. 253, 54 So. 92; *Ross v. Savage*, 66 Fla. 106, 63 So. 148.

In the case of *Strong, etc., Co. v. Baars*, *supra*, we said:

'In order to create a contract it is essential that there should be a reciprocal assent to a certain and definite proposition. So long as any essential matters are left open for further consideration, the contract is not complete, and the minds of the parties must assent to the same thing in the same sense.'

'The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce,' etc. 13 C. J. p. 289, par. 100; *Ocala Cooperage Co. v. Florida Cooperage Co.*, 59 Fla. 390, 52 So. 13.

* * *

'Under the rules applicable to offer and acceptance generally, a contract by correspondence is not complete until the communications have passed beyond the state of preliminary negotiations. The minds of the parties must have met, and it must appear that at some point in the correspondence there was a definite proposal by one party which was unconditionally accepted by the other.' 13 C. J. p. 299, par. 114.

The correspondence relied upon by the complainant to constitute a contract for the sale to it of the property described, by the respondent, does not, in our opinion, show such a meeting of the minds of the parties as would make a valid, enforceable contract upon the part of the respondent to convey the property to the complainant. There does not appear to have been a point reached in the correspondence where there was a definite proposal made by one of the parties which was unconditionally accepted by the other.

'Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of the minds and consequently no contract, while the agreement is incomplete.' *Ocala Cooperage Co. v. Florida Cooperage Co.*, *supra*.

The court below did not err in its decree sustaining the demurrer to and dismissing the bill of complaint. The decree is therefore affirmed.

Affirmed.

PER CURIAM. [*Dissenting opinion omitted*].

4. Sufficiently Definite Terms

CITIZENS BANK OF PERRY v. HARLIE LYNCH CONSTRUCTION CO., INC.

District Court of Appeal of Florida, First District, 1983

426 So.2d 52

JOANOS, Judge.

This is an appeal pursuant to Fla.R.App.P. 9.103(a)(3)(C)(iv), of an order granting summary judgment as to liability on Lynch's complaint for breach of contract. We
affirm.

The undisputed facts are that The Citizens Bank of Perry ("Bank"), on December 31, 1980, sent invitations to bid on the construction of a proposed branch facility to several contractors including Harlie Lynch Construction Company, Inc. ("Lynch"). Lynch submitted a bid which was accepted by the board of directors in January, 1981. Bank President Moore orally notified Lynch that its bid had been accepted. The architect for the project was directed by letter to prepare a written contract to be executed by the parties. The written Owner-Contractor Agreement was not executed because at a meeting held in February, 1981, a new board of directors decided the proposed building was too large and too expensive.

* * *

Lynch sued the Bank, alleging that its bid had been accepted and the Bank had directed that a formal contract be drawn up in accordance with the invitation to bid and the plans and specifications; Lynch had been notified of acceptance of its bid; more than thirty-one days after notification and acceptance, the Bank notified Lynch it would not allow it to perform the contract; the Bank never returned Lynch's bid bond which had been submitted along with the bid and accepted by the Bank; the Bank refused to allow Lynch to perform the contract even though it was ready, willing and able to perform as agreed.

Both Lynch and the Bank moved for summary judgment. [ ].

The Court granted summary judgment in favor of Lynch, finding that the Bank had invited Lynch to bid according to the plans and specifications; the invitation to bid set forth in detail the Bank's requirements for a contract with

the successful bidder; in accordance with all the terms and conditions, Lynch offered a bid accompanied by a bid bond conditioned on the payment of 5% as liquidated damages should it fail to strictly perform, as set forth in detail in the invitation to bid; the board of directors of the Bank accepted Lynch's bid as submitted and notified Lynch of this acceptance; the terms defined by Bank in the invitation, offered by Lynch, and accepted by the Bank were sufficiently definite and certain so that each party knew what was required of it by the offer and acceptance; after notifying Lynch of acceptance of the bid, and after a change in the constituency of the board of directors, the Bank failed to allow Lynch to perform even though Lynch was ready, willing, and able to perform as agreed; a contract existed and the Bank's conduct constituted a breach.

* * *

Appellant argues that the granting of summary judgment was error because genuine issues of material fact existed as to the parties' intent that their negotiations be reduced to a formal writing, and as to essential contract terms which remained open for consideration. However, a review of the record reflects that as to the essential terms of the contract, the trial court correctly determined that the terms specified in the invitation, offer, and acceptance were sufficiently definite and certain so that each party knew what was required of it by the offer and acceptance, and no essential terms remained open for negotiation.

We also reject the argument that a genuine issue existed as to the parties' intent to be bound before executing a written contract. We have not overlooked the guidelines set forth in *Owens v. MacKenzie*, 103 So.2d 677 (Fla. 1st DCA 1958), which appellant cites as authority, regarding the use of summary judgments when the parties' intent is alleged to be involved, (footnote omitted) or the statements in *Ocala Cooperage Co. v. Florida Cooperage Co.*, 59 Fla. 390, 52 So. 13 (1910) and *Mann v. Thompson*, 100 So.2d 634 (Fla. 1st DCA 1958), (footnote omitted), for which the *Ocala* opinion provides authority, that "[w]hen the parties intend that their negotiations be reduced to a formal writing, there is no binding contract until the writing is executed." However, the detailed bidding and contract documents do not appear to contain language which expresses an intent not to be bound, regardless of an oral agreement, until a formal written instrument had been signed. On the contrary, these documents clearly provided that should Lynch fail to execute the formal written agreement after acceptance of his bid, he would forfeit his 5% bid bond as liquidated damages. In other words, as there appear to be no conflicting legal inferences that could be drawn regarding the expressed intent of the parties so as to alter the legal effect of the undisputed facts of offer, acceptance, and communication of that acceptance to Lynch, the summary final judgment as to liability is AFFIRMED.

SHAW and WIGGINTON, JJ., concur.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 1

1. The elements of contracts formation
2. The components of an offer
3. The differing intents determining whether an offer has been made
4. The objective standard for intent
5. The concept of Eminent Domain
6. Questions for the court and questions for the jury

SUGGESTED EXERCISE(S)

1. Ask the students individually to write or rewrite a "facts" paragraph for the *Jericho* case in three sentences or less. Once completed, break the students into small groups, each of which will discuss and decide on a joint "facts" paragraph that will be presented to the entire class. (Skill: quick synthesis of only the most necessary facts in order to frame the issue and its analysis).

2. Select small groups of students who are instructed to find either (1) the State of Florida Supreme Court's Standard Jury Instructions on contracts; or (2) local county instructions, if they exist. (This may be done in a law school library or via internet research). Have a spokesperson indicate the nature of the coverage (Skill: localized research and cross-referencing of jury instructions to lessons learned in class).-

Chapter 2: BASICS OF ACCEPTANCE

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In the last Chapter, we learned that the State of Florida (no different than in other states) sets out three primary 'components' of the offer: (1) current intent, (2) communication, and (3) sufficiently definite and certain terms. The acceptance component is comprised of the same three requirements, although the terminology differs in one. These primary components are the following: (1) a current intent to accept; (2) communicated to the offeror; and (3) responsive to the requirements of the offer. First, like the current intent for an offer, an acceptance must also contain a current rather than a future intent. Second, an offeree who wishes to accept an offer must communicate such

intent before the offeror is bound by it. Third, the terms of the acceptance must match the expectations of the offer. Readers may have heard of the "mirror image" rule, which requires that the purported acceptance does not make changes to the offer's terms in any way. The old common-law "mirror image" rule has softened over time, which is why a better term to use now (and especially for U.C.C. Article 2 sale of goods cases, explained later in this Chapter and evidenced by the material in Chapter IV) is "responsive."

The first case covered in this Chapter sets out the components, although a bit incompletely, using the vehicle of an offer and acceptance to settle an insurance claim. The opinion in that case makes clear that Florida courts may still apply the "mirror image" rule when it notes that the acceptance "must also be [ ] absolute, unconditional, and identical with the terms of the offer.… in the mode, at the place, or within the time [ ] stated in the offer." *See infra Hanson v. Maxfield*, 23 So. 3d 736 (Fla. Dist. Ct. App. 1st 2009). Though the parties came close to agreement, the acceptance did not quite match the specific requirements set out in the offer. Accordingly, the case was remanded for further proceedings because no agreement was reached. There are at least two interesting items in the opinion. The first is the use of an objective test to determine whether a contract was formed, which we interpret to mean that the test for whether an acceptance was made is an objective one. This is the same as was explained regarding how one judges the current intent of a purported offer. The second is to point out with caution that the opinion in the same paragraph also addressed the fourth element of a contract – the sufficient specificity of essential terms or "meeting of the minds" when it notes that contract formation requires, "…agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing." Addition of this language muddles the ruling. Is it based on failure of acceptance? Or is it based on failure of the mutuality/meeting of the minds element (which readers of Chapter I may remember is phrased as "sufficient specificity of essential terms)?

CMM Approach: We recommend another CMM approach, which is to clearly delineate each element and put the facts through the test of its respective component. This should be followed by a decision, and if the answer is "no formation," this should be treated as definitive. More directly, readers should determine whether there is an acceptance, and if not, conclude that there is no formation. If on the other hand there is an acceptance, then readers are called upon to whether the following two elements, distinctively and respectively, are also met. To base a ruling on the fact that it looks like there may not be proper acceptance, and further there was no "meeting of the minds" anyway, only muddles the analysis. Law students are often expected to argue in the alternative, but legal opinions that do so create the kind of uncertainty that may baffle those who are new to the study of law and who

could use some clarity. A ruling that finds no acceptance, 'but even if there were, there was no mutuality,' avoids a clear delineation.

Following consideration of the components of an acceptance, the material covers two major types of contracts from the perspective of the nature of the response that an offer expects. Is it an offer of a reward, where the offeror expects actual performance and does not need or want any promise to take steps or do a good job? Or does the offeror expect the offeree not only to do some work but to promise to do the job well or to complete the task on time? Sometimes an offer makes clear whether it expects actual performance, on the one hand, or a promise about the nature of the performance, on the other. Problems in this Chapter should make clear the reason why this is an important distinction.

1. Components of Acceptance

It is quite acceptable to use the term "elements" for the requirements of acceptance instead of the term "components.' Use of different terminology hopes to instill a sense of the hierarchical differences. There are elements of formation, and each of these elements has its own sub-elements, i.e. "components."

HANSON v. MAXFIELD

District Court of Appeal of Florida, First District, 2009

23 So.3d 736

VAN NORTWICK, J.

Samuel M. Hanson, Cecil Hanson and Rebecca Hanson appeal an adverse final judgment in the negligence action filed by Jamie Maxfield, appellee, arising out of a motor vehicle accident in which a motorcycle driven by Darin Bryan, on which Maxfield was a passenger, collided with an automobile driven by Samuel Hanson when Hanson turned in front of the motorcycle. The Hansons argue that the trial court erred in denying their motion for summary judgment since the parties had entered into a settlement agreement prior to the suit. We agree. Reading the documents that the Hansons assert comprise the settlement agreement, we conclude that the parties did enter into an enforceable settlement agreement. In view of our holding, it is not necessary

to reach Maxfield's cross-appeal, which argues that the trial court erred in failing to enter a directed verdict on Bryan's comparative negligence.

Maxfield filed suit against Samuel Hanson and his parents, who owned the vehicle he was driving at the time of the accident, alleging that the accident was caused by Samuel Hanson's negligent maintenance or operation of the Hanson automobile. The Hansons answered and, as one of several affirmative defenses, alleged that the parties had entered into a binding settlement agreement prior to the suit. The trial court denied the Hansons' motion for summary judgment on this affirmative defense, and the case proceeded to trial. The jury returned a verdict finding that Hanson was 70% at fault for the accident and that Bryan was 30% at fault.

The settlement agreement between the parties comprises two letters exchanged between the parties' attorneys. By a letter dated April 15, 2005, Maxfield's trial counsel made an offer of settlement on her behalf which provided, in pertinent part, as follows:

> I believe my clients are both in a position now to accept the policy limits to release both Samuel Hanson and Cecil Hanson of all claims arising from the automobile collision that occurred on June 12th of 2004.
>
> However, because of the unanswered questions about the potential coverage under the Allstate CGL policy issued to Bob and Betty Abbott d/b/a Betty's Pizza, and other insurance potentially available to them and others who may be responsible for the loss, the release will have to be carefully drafted to ensure that it in no way impairs any claims against any person or company other than the driver and owner of the Hanson vehicle.
>
> In reviewing the information that I received in response to my request for the policy under F.S. 627.4137, I notice that I was given only the amendatory endorsements for one policy, and not the actual policy itself or a declarations page for it. I will of course, need a properly certified policy and full compliance with that statute as part of this settlement, in order to confirm that there is no other coverage available to either the owner or driver.

The Hansons responded to this offer in a letter dated May 13, 2005, from counsel for State Farm Insurance Company, the Hansons' insurer. The May 13 letter provided, in pertinent part, as follows:

... The purpose of this letter is to respond to your clients' settlement demands as set forth in your letter of April 15, 2005.

State Farm accepts your settlement offers made on behalf of your clients in your April 15, 2005, letter. Specifically, State Farm is paying $10,000.00 to Darin Edward Bryan and $10,000.00 to Jamie Maxfield in return for releases of Cecil, Rebecca and Samuel Hanson, driver and owners of the Hanson vehicle. Enclosed please find draft, No. 1 19 230550 J, made payable to "Darin Bryan, a Single Individual & Morgan & Morgan, his Attorney," and draft, No. 1 19 230553 J, made payable to "Jamie Maxfield, a Single Individual & Morgan & Morgan, her Attorney." The settlement funds may not be disbursed until the enclosed Releases, or mutually agreeable substitute releases, have been executed and returned.

Also, enclosed is a certified copy of the State Farm insurance policy, with endorsements and declarations page, policy No. 491 0398-C15-591, issued to Cecil and Rebecca Hanson and in effect on the date of the accident. We have also included a supplemental disclosure pursuant to Florida Statutes Section 627.4137. The providing of this policy and supplemental disclosure, together with the disclosure statements by Bob Rodriguez and Paul Donald, dated June 21, 2004 and September 22, 2004, respectively, previously provided to you, constitutes full compliance with Florida Statutes, Section 627.4137.

Finally, enclosed please find Releases to be executed by your clients, Darin Edward Bryan and Jamie Maxfield, solely releasing Cecil, Rebecca and Samuel Hanson.... The form of this Release was largely drafted by the attorneys representing the Hansons, and it has been approved for use by them. I recognize that you may feel the form is not acceptable to your client. Please be assured that both the attorney representing the Hansons and I will be willing to discuss proposed changes, and will work with you to arrive at a form agreeable to all. Unilateral changes to the release form are not acceptable.

We are pleased that the parties were able to reach an amicable resolution of this matter. I look forward to receiving signed Releases from you.

Maxfield does not assert that the drafts or the form of release enclosed with the May 13 letter fail to comply with the conditions of the settlement. Maxfield contends, however, that the insurance policy and disclosures provided with Hansons' acceptance letter did not comply with the disclosure requirements of section 627.4137(1), Florida Statutes (2005). [Footnote omitted] Thus, Maxfield argues, the conditions of the settlement offer have not been met by the Hansons' acceptance and, as a result, the parties have not reached agreement as to all essential terms.

"Settlements ... are governed by the rules for interpretation of contracts." *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla.1985); see also *Williams v. Ingram*, 605 So.2d 890, 893 (Fla. 1st DCA 1992). As with any contract, a settlement agreement is formed only when one party makes an offer and another party accepts it. An acceptance of a settlement offer will be effective to create a binding settlement only if it is absolute, unconditional, and identical with the terms of the offer. *Nichols v. Hartford Ins. Co. of the Midwest*, 834 So.2d 217, 219 (Fla. 1st DCA 2002); *Schlosser v. Perez*, 832 So.2d 179, 182 (Fla. 2d DCA 2002). The acceptance must also be in the mode, at the place, or within the time expressly or impliedly stated in the offer. *Nichols*, 834 So.2d at 219; *Cheverie v. Geisser*, 783 So.2d 1115, 1119 (Fla. 4th DCA 2001). Courts use an objective test to determine whether the parties have made an enforceable contract. *Robbie*, 469 So.2d at 1385. "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs-not on the parties having meant the same thing but on their having said the same thing." *Id.* (quoting *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 302 So.2d 404, 407 (Fla.1974)). Settlements are "highly favored and will be enforced whenever possible." *Robbie*, 469 So.2d at 1385.

In the settlement offer made by Maxfield, the essential terms were (1) paying to Maxfield the policy limits of the subject insurance policy, (2) structuring the release to avoid impairing any claims against "any person or company other than the driver and owner of the Hanson vehicle," (3) delivering a "properly certified policy," and (4) complying with section 627.4137 "in order to confirm that there is no other coverage available to either the owner or driver."

The May 13 letter, written on behalf of the Hansons, states that it "accepts your settlement offer made on behalf of your clients in your April 15, 2005, letter." Thus, the May 13 letter is an unequivocal and unconditional acceptance of the offer made in the April 15 letter. In the remainder of the May 13 letter, State Farm's counsel, on behalf of the Hansons, seeks to perform the conditions of the settlement. Accordingly, counsel encloses with the letter two drafts in the amount of $10,000 each; a release seeking to satisfy Maxfield's concerns; documents which he represents to be a certified copy of the subject insurance policy; and documents which, he represents, "constitute[ ] full compliance with Florida Statutes, Section 627.4137."

In arguing that no settlement agreement was reached, Maxfield relies primarily on *Cheverie v. Geisser* and *Schlosser v. Perez*. Both cases are distinguishable. In *Cheverie*, the parties exchanged a series of ten letters which the trial court found constituted an enforceable settlement agreement. 783 So.2d at 1117-18. The district court reversed, however, because it concluded there was no evidence of acceptance of two crucial terms: the language of the release and the affidavit mandated by section 627.4137. 783 So.2d at 1119-20. The letters exchanged by the parties in *Cheverie*, unlike the letters in the case under review, make it clear that there was no meeting of the minds, much less an agreement on the "external signs." *Robbie*, 469 So.2d at 1385.

In *Schlosser*, the plaintiff's offer expressly stated: "Please understand that this settlement offer is intended to be an offer for a unilateral contract which will be accepted only by strict performance and not a promise to perform by you and/or your insureds, or substantial performance or partial performance by you and/or your insureds." 832 So.2d at 180-81. The offer further provided that, as one of its conditions, the defendant provide "all the information required by Florida Statute 627.4137." *Id*. at 180. In a series of correspondence, the defendant attempted to comply with the conditions of the offer; however, the defendant's insurer refused to provide the statement provided by section 627.4137. *Id*. at 181. The trial court found that the parties had reached an enforceable settlement agreement. *Id*. at 180. The district court reversed, finding that the defendant's "acceptance was not identical to the essential terms of the offer" because the defendant failed to provide the disclosure under the statute. *Id*. at 183.

Unlike the series of conflicting letters in *Cheverie*, the two letters here constitute a settlement offer with specific terms and an unequivocal acceptance of the terms offered. In addition, although Maxfield asserts that her offer was, like the offer in *Schlosser*, an offer for a unilateral contract that required the Hansons to perform the conditions specified in the offer in order to accept it, her assertion is not supported by the record. Maxfield's offer contains no language indicating that the conditions must be performed to have an acceptance of the settlement offer.

We reverse and remand for further proceedings. We recognize that, on remand, Maxfield is likely to assert that, even if a settlement agreement was reached, the Hansons have failed to perform essential conditions of the settlement agreement. In that event, the trial court should determine whether the Hansons have failed to perform their obligations under the settlement agreement, and, if so, the remedy which is appropriate. See generally, S.R. Shapiro, Annotation, *Remedies for Breach of Valid Accord or Compromise Agreement Involving Disputed or Unliquidated Claim*, 94 A.L.R.2d 504 (1964).

We do not address whether any failure to perform occurred or the range of appropriate remedies.

REVERSED and REMANDED for further proceedings consistent with this opinion.

WOLF and KAHN, JJ., concur.

A. Current Intent to Accept the Offer

BULLOCK v. HARWICK

Supreme Court of Florida, Special Division A, 1947

158 Fla. 834

CHILLINGWORTH, Associate Justice.

This is an appeal from a final decree dismissing a bill for specific performance after a trial had been had before the court. The decree contained no findings on the part of the court.

It may be observed that tersely worded findings of fact and, when appropriate, an equally brief statement of the controlling conclusions of law of the trial court, placed in a decree, are often informative to counsel, and of great aid to the appellate court. They are not mandatory, (F.S.A. § 63.66), but they serve as a guide by which the Supreme Court can check the correctness of the findings of fact and the legal conclusions of the Chancellor. *Day v. Weadock*, 101 Fla. 333, 134 So. 525; *Gregg-Maxcy, Inc., v. Bateman*, 119 Fla. 490, 160 So. 745; *Central Hanover Bank & Trust Co. v. Smith*, 134 Fla. 845, 184 So. 513. In *Dade County v. South Dade Farms*, 133 Fla. 288, 182 So. 858, this Court not only approved but commended Chancellors in making specific findings of fact.

After a series of preliminary letters and telegrams the vendor, the principal defendant in the suit below, and appellee here, sent a telegram as follows:

> 'Re Purchase Stock Colombian Export Line by Bullock... Closing Judge Southerland Office Stop Harwick Expects Arrive Miami About September 21st.'

On September 24th, the vendor and the vendee, plaintiff-appellant, met in the office of an attorney in Miami Beach. The vendor expected to close the sale at that time. He asserted that he had in his pocket all of the original stock certificates, the resignations of the three officers of the corporation, and that he had with him the corporate minute book. But he did not expose the certificates or the resignations. Doubt is case (*sic*) upon his actual possession of these certificates. He testified that he had obtained them from a safety deposit box on the morning of September 24th, only readily to admit his obvious mis-statement, when confronted by evidence of the bank vault officials showing that he had made no entry to the box on that day, or prior thereto, or that he was even then authorized to have access to the box. He did not have the stock record book with him, or any evidence of the fact that the only indebtedness of the corporation was the purchase money mortgage due on the property or that the corporation was in good standing at the time.

The vendee did not have with him a bank draft of any nature, nor did he have the requisite amount in cash or a certified check or cashier's check. The vendee asserted that he had funds available which could be readily obtained as soon as the vendor was in a position to do the things he was required to do by his offer. None of the purchase price was ever paid. No writing was ever signed by the vendee. While the evidence is conflicting, it is reasonable manifest that the vendor did not definitely withdraw the offer, nor did the vendee definitely accept the offer. Neither, by words or conduct, clearly evidenced the obligations he desired to assume, or his real intentions. At the conclusion of the conference the vendor, in relating his parting words to the vendee, said: 'I told him I would be back in a few days: 'I told him interested further I would get in touch with him.' The vendee was no more precise in him attitude than the vendor.

The parties separated. No further action was taken by the vendor except to phone the attorney who arranted the conference and with whom they had met the day before. The vendor inquired of the attorney whether the attorney thought that the vendee really had the cash for the transaction and would go through with the deal. In response to an affirmative answer, he made no further statement.

On December 26, 1945, about three months later, the vendee made a tender of $75,000 cash to the attorney for the vendor. Upon its rejection the vendee immediately filed suit for specific performance.

The record tells a tale of two skillful and wary traders in action. The vendor was willing to close the deal September 24th and apparently willing vaguely and indifferently to keep the offer open. But he specifically declined to sign a contract, or execute any further writing, or to produce any evidence of a present ability to fully perform, until the cash, or its equivalent, was actually in sight. The vendee, anxious to keep the offer open, was careful not to accept in writing. He, being either unwilling or unable to produce the cash and also unwilling to be bound in law for the purchase price, was also vague and indifferent about any definite verbal acceptance of the offer. After September 24th, the vendor and vendee saw each other a number of times, usually in a restaurant where they would have lunch, but neither ever approached the other about the sale or the prospects of closing any sale. One may fairly infer that had the market value of this property gone down, rather than up, between September 24th and December 26th, no suit would have been filed by the purchaser. Without the institution of this suit, the purchaser would not have been bound at any time to pay the purchase price of this property, unless he had done something more than he had done prior to then.

* * *

This Court held in *Prescott v. Mutual Benefit Health & Accident Association*, 133 Fla. 510, 183 So. 311, 119 A.L.R. 525, in an opinion by Justice Buford, that a mere offer not assented to constitutes no contract, for there must be not only a proposal but an acceptance, and, so long as the proposal was not acceded to, it is binding on neither party and may be retracted. *Webster Lumber Co. v. Lincoln*, 94 Fla. 1097, 115 So. 498; *Jones et al. v. Toms*, 150 Fla. 873, 9 So.2d 96; 17 C.J.S., Contracts, §§ 42, 50, pp. 378, 395; *Morgan v. Patillo*, 5 Cir., 24 F.2d 204.

Therefore we hold that it was not clearly established that there was a definite acceptance by the vendee on September 24th and that the offer was effectually withdrawn by the action and words of the vendor on September 24th and confirmed by his conduct thereafter. The acceptance of December 26th was too late.

Affirmed.

THOMAS, C. J., and TERRELL and CHAPMAN, JJ., concur.

Note

The last case never clearly delineates that an acceptance must objectively demonstrate a *current intent*. Each of the parties cagily avoided locking in to a written offer, on the one hand, and expressing a clear acceptance on the other. To be gleaned from the court's language is that though not in writing, there appeared to be an offer. The problem was that such offer, whether in writing or not, was, "not assented to…." Expressed somewhat differently, but more helpfully, the ruling was that the offeree did not objectively express a currently intended acceptance to the terms and conditions of the offer. Somewhat unfortunately the opinion does not make fully clear whether it believed that there was not yet a proper offer, or a proper acceptance, or a proper meeting of the minds. Thankfully, at least the "consideration" element was not wrapped into this conundrum.

CMM Approach: Readers are again encouraged to follow the CMM approach advocating clear delineation. Perhaps a short analysis, from a law school exam perspective, may prove helpful:

> *Both parties warily approached each other so as not to lock their side of the performance until the other had fully committed. It does appear that there was an offer, with a current intent, it was communicated, and it contained the essential terms with sufficient specificity. On the other hand, even if there were an offer, the purported acceptance, objectively viewed, was tentative rather than definitive, which would appear to indicate the lack of a current intent to accept – even though it is true that the parties were close to agreement. For this reason, no contract was formed – i.e., either for a lack of offer or for a lack of acceptance. At this point, there would be no need to analyze the other elements of contracts formation, but the facts could also support a ruling that there would have been no meeting of the minds either.*

One of the most frustrating aspects of learning contracts is that resolution of a question depends greatly on the facts, not to mention that there are special rules and exceptions. The recommended CMM approach is that for every topic, such as whether there is a current intent to accept, readers develop a simple example for each possibility. In the least, one may argue both sides, then pick the one that seems more likely to develop an analysis and conclusion. The following problems identify a different issue of acceptance. Can you figure out which?

Problem 2-1

Seller offered to sell his guitar to Buyer for the great price of $250. Buyer handed over $250 cash. Was a binding contract formed? How?

Problem 2-2

Seller offered to sell his guitar to Buyer for the great price of $250. Buyer accepted by promising to pay Seller $250 on Friday after Buyer got paid. Was a binding contract formed? If yes, why? If not, why not?

Problem 2-3

Seller offered to sell his guitar to Buyer for the great price of $250. Buyer replied, “That’s a great price! Let me check the budget with my wife, and I’ll get back to you tomorrow!” Was a binding contract formed? Further, did it reject the offer, or keep it alive?

B. Communicated

KENDEL v. PONTIOUS

Supreme Court of Florida, 1972

261 So. 2d 167

ADKINS, Justice.

* * *

A deposit receipt was executed by defendant-purchaser Fernandez on January 13, 1969, and on the same date was mailed by the defendant-broker Pontious to the attorney for the plaintiff-sellers. The deposit receipt contained the following provision:

> ‘Time shall be the essence and this contract shall be binding on both parties, their heirs, personal representatives and/or assigns when this contract shall have been signed by both parties or their agents.’

By letter dated January 14, 1969, addressed to the defendant-broker, the attorney for the sellers acknowledged receipt of the contract and stated that he would have the contract executed forthwith and a copy returned to the broker. The contract was signed by the sellers and delivered to the office of the sellers’ attorney on January 17, 1969. Notice of the execution of the contract by the sellers was first communicated to the purchaser by letter

dated January 22, 1969. In the meantime, by letter dated January 17, 1969, the purchaser had written the sellers, with copy to the sellers' attorney, revoking the offer to purchase. This letter was in confirmation of a telegram dispatched the same date.

In this suit brought by the sellers for specific performance, the pivotal issue is whether the contract was revoked before acceptance. The trial judge held that acceptance of the purchaser's offer was not effective until communicated to the purchaser. The District Court of Appeal affirmed. In seeking jurisdiction, petitioners-sellers rely upon Strong & Trowbridge Co. v. H. Baars & Co., *Supra*, where the plaintiff brought suit for the alleged breach of two contracts for the sale of certain lumber. This Court said the main question was whether the evidence established that there were actually consummated contracts from the documents passing between the parties. Petitioners argue that the following quote is in conflict with the decision of the District Court of Appeal in the case *Sub judice*:

> 'The acceptance of an offer, to result in a contract, must be: (1) Absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly required by the offer. If a person offers to do a definite thing, and the person to whom the offer is made accepts conditionally, or introduces a new term into the acceptance, his answer is not an acceptance; but it is either a mere expression of willingness to that, or it is in effect a counter offer, which must be accepted or assented to before a contract can result. *It is also essential that the acceptance shall be made in the manner, at the place, and within the time expressly or impliedly designated in the offer. The proposer has the right to dictate terms in respect to the time, place, and manner of acceptance, and when he does so, like other terms, they must be complied with*.' (Emphasis supplied) Strong & Trowbridge Co. v. H. Baars & Co., 54 So. 92, pp. 93—94.

* * *

It was necessary that the sellers do more than indicate their acceptance of the purchasers' offer by signing the deposit receipt. They were required to set in motion some means by which knowledge of that acceptance would come to the purchasers before any enforceable contract could arise. An acceptance, under these circumstances, which only remains in the breast of the acceptor without being communicated to the offeror, is no binding acceptance. As stated in Williston on Contracts, (Third Edition) Vol. 1, s 70, p. 230: 'As has been seen the acceptance of a bilateral contract is not only a manifestation of assent to the proposition but is a giving of the return promise requested. To

complete a contract, the offeror must always be given what he requests as the return for his promise and in an offer for a bilateral contract he requests either a promise in fact or an obligation in law. In order to complete a bilateral contract, therefore, on the former supposition the offeree must in fact make a promise to the offeror, and a promise, as the offeree should reasonably understand, is something which involves, if not communication, at least attempted communication.' [*The opinion went on to quote other treatises for the same premise*.]

* * *

The writ of certiorari having been improvidently issued, the same is discharged.
It is so ordered.

ROBERTS, C.J., and CARLTON and BOYD, JJ., concur.

ERVIN, J., dissents with opinion.

Note

Another discussion about nomenclature is in order. There are similar terms and phrases used for different contracts rules that can lead to confusion for the unwary. For example, the third component of an acceptance is responsiveness – which indicates agreement with all of the truly important aspects of an offer. Were we to apply the common law "mirror image" rule, we could say "completely responsive" or "exactly corresponsive" to mean the same thing. Thus, "responsive" connotes the newer approach of "close, so long as all the main items match, is good enough…" As noted in Chapter I, the fourth *element* of contract formation is "sufficient specificity of essential terms," which would appear to be Florida's version of what other states and scholars call "mutuality" or a "meeting of the minds." *See DiMase v. Aquamar*, 835 So. 2d 1150 (Fla. Dist. Ct. App. 3d 2002). Though subtle, readers should be aware that the responsiveness *component* for an acceptance is still a different animal than the 'sufficient specificity of essential terms' *element* of formation. It would be necessary to fully address the fourth element only if acceptance is satisfied.

CMM Approach: The recommended CMM Approach is to address these issues separately and to use the specified terminology in a somewhat mercenary fashion. Thus, if an offer is not responsive, then an acceptance fails for lack of the second element (no acceptance) and there is no contract formation. This in turn means that one would need not address the fourth element of formation (at least in depth) since it has been ruled out already.

Full understanding may take time, but clear delineation even without full comprehension is the way to go. As readers become more familiar with the concepts and terminology, things will, as law professors like to say, “click.” Failure to pay attention to distinctions, categories, and their accompanying terms, elements and components will, however, will cause the “clicking” to take more time.

(1). Silence as Acceptance

It is sometimes difficult to locate cases that are directly on point, whose facts are relatively simple, and that are issued by the best court.[2] In the case that follows, the law is obscured, but not countermanded, in at least three important ways. First, though this is a case involving Florida parties and a Florida contract, it was decided by a federal court determining what is, or would be, Florida law. Second, the law to be gleaned is from a negative implication. The law being explained is described, but the federal court in *Nationwide Mutual Fire Insurance Co.* ruled that its requirements were not met. Third, another federal court opinion disagrees with the ruling the *Nationwide Mutual Fire Insurance Co.*, though it is on a basis that does not change the premise for which the case is being included. Readers are directed to footnote 16 embedded in the case for a more "black letter" statement of the rule that silence can act as an acceptance under appropriate circumstances.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v. ROYALL

United States District Court, M.D. Florida, Orlando Division, 2008

588 F. Supp. 2d 1306

GREGORY A. PRESNELL, District Judge.

* * *

1. Background

Nationwide, the Defendants’ general commercial liability insurer, brought this action for declaratory relief to determine whether it has a duty to defend and a duty to indemnify its insureds in an underlying action filed in State court.…

* * *

In addition to seeking a judgment that it has no duty to defend or indemnify its insureds, Nationwide’s Motion for Summary Judgment also seeks

2

reimbursement for attorneys' fees and costs which have been expended in the underlying action since March 28, 2006. [Footnote omitted].

* * *

C. Reimbursement for Attorneys' Fees and Costs

Because Nationwide's policies are silent with respect to the recovery of attorneys' fees and costs in the event Nationwide defends a suit for which it is later determined there is no duty to defend, Nationwide relies on its reservation of rights as the basis for reimbursing its fees and costs. As previously noted, Nationwide sent three reservation of rights letters to Defendants. Only the last of these three letters, which was sent on March 28, 2006, asserted Nationwide's right to recover fees and costs incurred in defense of the underlying lawsuit. Approximately two months prior to first asserting its right to be reimbursed, however, Nationwide had advised its insureds that it was undertaking the defense of the underlying suit on their behalf and that it had retained counsel to do so (Doc. 53, Ex. C). [Footnote omitted].

In the last eight years, Florida courts appear to have joined the majority of other jurisdictions [Footnote omitted] which permit insurers to recover costs and fees expended on behalf of an insured where there has been no duty to defend but the policy is nevertheless silent as to reimbursement. *See Jim Black & Assocs., Inc. v. Transcontinental Ins. Co.*, 932 So.2d 516 (Fla. 2d DCA 2006); *Wendy's of N.E. Fla., Inc. v. Vandergriff*, 865 So.2d 520 (Fla. 1st DCA 2003); *Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So.2d 1034 (Fla. 1st DCA 2000)….

* * *

The common thread throughout these three decisions is that, fundamentally, the relationship between an insurer and an insured is governed by the law of contracts. With respect to reimbursement of fees and costs, in particular, Florida courts appear to require the formation of a separate agreement between the insurer and insured before the insurer will be entitled to recover its fees and costs. Indeed, as the *Wendy's* decision makes clear, an insurer cannot, by a general reservation of rights which makes no mention of reimbursement, retroactively recover fees and costs without having first provided reasonable notice to the insured. Instead, the insured must first make an offer which the insured, in turn, accepts (i.e., the insurer and insured must first agree that the insurer will continue to front the fees and costs of the underlying litigation with the understanding that, should there ultimately be no coverage, the insurer will have the right to recover its fees and costs). [Footnote omitted]. Only at that point, as the *Colony* and *Jim Black* decisions

found, have the parties formed a separate agreement upon which the insurer may be entitled to reimbursement.

In this case, the insured simply said nothing after the March 28, 2006 letter. As a result, the insurer apparently claims acceptance by acquiescence. Whether acceptance of a contract may be inferred from acquiescence, however, has long plagued Florida's jurisprudence. *See, e.g., Kaskisto v. N. Am. Equitable Life Assur. Co.*, 405 So.2d 248 (Fla. 3d DCA 1981) (failure to object to altered mortgage rate schedule conflicted with general principle of law that silence does not constitute acceptance); *Kanter v. Safran*, 68 So.2d 553, 559 (Fla.1953) (finding implied acceptance of lessor's offer to re-take premises for lessee's account upon lessee's relinquishment of premises); *Summerall v. Thoms*, 3 Fla. 298 [ ] (1850) (noting that "The omission to disaffirm a contract within a reasonable time, has been held sufficient evidence of a ratification ... 'Acquiescence merely for an unreasonable time is an act that denotes an intent not to rescind the contract.' ") (citations omitted). In the limited circumstances in which acquiescence may constitute acceptance, the law appears to require, at a minimum, that there at least be some reasonable time for the offeree to reject the offer before acquiescence will be deemed an acceptance.[16]

Neither the *Colony* nor the *Jim Black* decision addresses the reasonableness of the time required for the insured to reject the insurer's offer before the insured's acquiescence will be deemed an acceptance. Both courts simply appear to have implicitly assumed that the insured had accepted the insurer's offer. In the absence of any controlling Florida authority on point, the Court anticipates that the Florida Supreme Court would require that some reasonable time elapse before the insured's acquiescence constitutes an acceptance. Based generally on the relationship of insurers and insureds, and notwithstanding the sophistication (or lack thereof) of the insured, the insurer should be required to give the insured a specific, reasonable time (e.g., fifteen days) within which to accept or reject a written offer of a defense conditioned upon the reimbursement of fees and costs. Where this written offer clearly and expressly states that the failure to reject the offered defense within the stated period will constitute an acceptance, the insurer will be entitled to reimbursement in the event the insured fails to object and it is later determined that there is no coverage under the policy.

In the instant case, there is no evidence that the insureds ever accepted Nationwide's March 28, 2006 offer to defend the underlying action upon the condition that Nationwide would have the right to be reimbursed for its attorneys' fees and costs in event there was no coverage. To be sure, Nationwide clearly provided the insureds with a defense after the third reservation of rights letter. However, absent express notice that a failure to object would constitute an acceptance, the insured's acquiescence in

Nationwide's offered [sic] does not constitute an acceptance. Consequently, there was no agreement to reimburse Nationwide for its fees and costs.

* * *

DONE and ORDERED.

Footnote 16: *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981) ("... Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation. (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer ...") (emphasis added).

Note

The quintessential "silence as acceptance" case is *Day v. Caton*, 119 Mass. 513 (1876). In that case, one party discussed with a neighbor the benefits of constructing a wall between adjacent estates and built ½ on one property and ½ on the other. The offer was never specifically accepted, but the first party built the wall over time and the neighbor said nothing. Silence, when there is a duty to speak up, can constitute acceptance. The neighbor knew that payment of half was expected. Because the case is so famous, it may be helpful to include here in the case that its facts, or similar ones, show up for example on the Multistate Bar Exam portion of a bar exam. Side note: frankly, this case could also be located under the concepts of promissory estoppel and detrimental reliance, covered later in Chapter 7. To avoid confusion, however, think of it now as a "silence as acceptance" case. Restatement (Second) Contracts § 69 is clear and an excellent source of material on this point. Outlining it is advised.

Many states including Florida have put an end to mailed "gifts" that obligate the recipient to a long term contract or the purchasing of other items in addition to the mailed "gift." To protect consumers from unscrupulous mail-order solicitors, the Florida Legislature passed the *Florida Free Gift Advertising Law*. FLA. STAT. § 817.415 (2017). Trying to strike a balance between sharp sales practices and legitimate ones, the Legislature has provided that indications of "free" or "no charge" mean exactly that. *Id.* at subsection (4).

C. Responsive

PENA v. FOX

District Court of Appeal of Florida, Second District, 2015

198 So. 3d 61

LUCAS, Judge.

* * *

1.

This case invokes a hornbook tenet of contract law: the symmetry needed between an offer and an acceptance to establish an enforceable agreement. Ms. Pena and Mr. Fox were involved in an automobile accident on July 4, 2013, in which Ms. Pena allegedly sustained injuries. Prior to filing a lawsuit, Ms. Pena's counsel delivered a settlement offer to Mr. Fox's insurer, USAA Casualty Insurance Company. In her offer, Ms. Pena requested the policy limits from USAA in exchange for her release of all claims against Mr. Fox relating to the accident. The settlement offer contemplated that USAA would provide a proposed release form for Ms. Pena to execute, but it imposed certain conditions to that form which Ms. Pena's attorney addressed in detail in the offer letter:

* * *

After receiving the offer, USAA tendered a settlement check along with a proposed release to Ms. Pena's counsel. The release prepared by USAA included a prefatory paragraph by which Ms. Pena would acknowledge receipt of the settlement funds and would "release, acquit, and forever discharge *Matthew R Fox* his/her heirs, executors and assigns, from any liability." USAA's proposed release went on to state the following terms concerning Ms. Pena's release:

> I/We further state that while I/we hereby release all claims against Releasee(s), its agents, and employees, the payment hereunder does not satisfy all of my/our damages resulting from the accident .... I/We further reserve my/our right to pursue and recover all unpaid damages from any person, firm, or organization who may be responsible for payment of such damages, including first party health and automobile insurance coverage, but such reservation does not include the Releasee(s), its agents, and employees .... Deeming the language "Releasee(s), its agents, and employees" as an attempt to expand the release to include USAA, Ms. Pena considered her prior offer rejected and proceeded to file a lawsuit against Mr. Fox. Mr. Fox responded by filing a Motion to Enforce Settlement, arguing Ms. Pena's complaint should be dismissed because it was barred by a settlement agreement.

* * *

2.

Settlement agreements are governed by contract law. *Gira v. Wolfe*, 115 So.3d 414, 417 (Fla. 2d DCA 2013); *Schlosser v. Perez*, 832 So.2d 179, 182 (Fla. 2d DCA 2002). Like any contract, a settlement agreement is formed when there is mutual assent and a "meeting of the minds" between the parties—a condition that requires an offer and an acceptance supported by valid consideration. *See Perkins v. Simmons*, 153 Fla. 595, 15 So.2d 289, 290 (1943) ("The parties must mutually assent to each of the terms and conditions of both the offer and the acceptance in order to be a meeting of the minds and the closing of a lawful and binding contract."); *Leesburg Cmty. Cancer Ctr. v. Leesburg Reg'l Med. Ctr.*, 972 So.2d 203, 206 (Fla. 5th DCA 2007) ("We start with the basic premise that no person or entity is bound by a contract absent the essential elements of offer and acceptance ... supported by consideration."). Florida law further requires that "an acceptance of an offer must be absolute and unconditional, identical with the terms of the offer." *Ribich v. Evergreen Sales & Serv., Inc.*, 784 So.2d 1201, 1202 (Fla. 2d DCA 2001) (citing *Sullivan v. Econ. Research Props.*, 455 So.2d 630, 631 (Fla. 5th DCA 1984)). That is, the acceptance must be a "mirror image" of the offer in all material respects, or else it will be considered a counteroffer that rejects the original offer. See, e.g., *Trout v. Apicella*, 78 So.3d 681, 684–85 (Fla. 5th DCA 2012) (applying mirror image rule to hold that insurer's proposed release of all claims rejected plaintiff's offer, which was limited to release of bodily injury claims); *Peraza v. Robles*, 983 So.2d 1189, 1189 (Fla. 3d DCA 2008) (determining that insurer's inclusion of a proposed hold harmless agreement and subrogation waiver release "constituted a separate additional requirement that conditioned the settlement on the submission of the requested documents," which acted as a counteroffer and rejection of plaintiff's original settlement offer). An attempted acceptance can become a counteroffer "either by adding additional terms or not meeting the terms of the original offer." *Grant v. Lyons*, 17 So.3d 708, 711 (Fla. 4th DCA 2009).

The release USAA delivered appears to have done both: it added parties beyond those Ms. Pena proposed to release in her original offer, and it materially deviated from the limitation Ms. Pena's offer clearly expressed. The proposed release specifically releases Mr. Fox, his heirs, executors, and assigns in its first paragraph but then in another inexplicably shifts its reference to "Releasee(s)," a term that is nowhere defined within the document. Assuming, as the parties have, that Mr. Fox, his heirs, executors, and assigns, and "Releasees" are all one and the same, USAA's release goes on to expand the latter term to include Mr. Fox's "agents and employees," who are also left undefined and otherwise unidentified within the release. Presumably, the release's inclusion of "agents and employees" meant

someone other than the "Releasee(s)" or Matthew R. Fox. *Cf. Hillsborough Cty. Aviation Auth. v. Cone Bros. Contracting Co.*, 285 So.2d 619, 621 (Fla. 2d DCA 1973) (holding that in interpreting a contract, "it must be assumed that each clause has some purpose"). Although the incongruity in terms may have been nothing more than boilerplate migrating across computer-generated files, nevertheless, "agents and employees" was a new term, and it was a part of USAA's response to Ms. Pena's offer. And that offer had been explicit: Ms. Pena would not agree to release any party other than Mr. Fox.[1]

While we share the circuit court's view that the inclusion of Mr. Fox's agents and employees within the release was not the product of nefarious motives, USAA's intention when it drafted this document, whatever it might have been, was irrelevant to the issue at hand. *Cf. Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla.1957) ("The making of a contract depends ... on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing." (quoting Justice O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897))); *Villareal v. Eres*, 128 So.3d 93, 100 (Fla. 2d DCA 2013) (holding that no settlement agreement was formed where insurer's proposed releases deviated from settlement offer's terms, noting "[i]t is the presence of the language in the proposed releases, not the effectiveness of the terms themselves, that [did] not comply with the offer"); *Akileh v. Elchahal*, 666 So.2d 246, 249 (Fla. 2d DCA 1996) (holding that husband's "subjective intent" at the time he entered into a marital settlement agreement "is not material in construing the contract"). The words are what matter because they will control who will, or will not, be released. *Gendzier*, 97 So.2d at 608 ("The writing itself is the evidence of what [the parties] meant or intended by signing it."); *Prestige Valet, Inc. v. Mendel*, 14 So.3d 282, 283 (Fla. 2d DCA 2009) ("The contracting parties' intent is determined from within the four corners of the document and construed in accordance with the agreement's plain meaning."). Mr. Fox's proposed acceptance would release additional parties, Mr. Fox's agents and employees, which Ms. Pena's offer would not. His acceptance did not mirror her offer.

3.

Reading Ms. Pena's offer and Mr. Fox's acceptance together, we conclude there was no meeting of the minds between these parties, and, thus, there was no settlement agreement that barred Ms. Pena's claims. *See Villareal*, 128 So.3d at 100; *Trout*, 78 So.3d at 681; *Peraza*, 983 So.2d at 1189.

Accordingly, we reverse the order dismissing the complaint and remand this case for further proceedings.

Reversed and remanded.

KHOUZAM and BADALAMENTI, JJ., Concur.

Footnote 1: Mr. Fox does not argue that his proposed release was merely a "usual settlement document" to be executed in the ordinary course of settling a personal injury claim. *Cf. Peraza*, 983 So.2d at 1190 (noting exception to mirror image rule where "usual settlement documents" are "implicit" in a settlement); *Erhardt v. Duff*, 729 So.2d 529, 530 (Fla. 4th DCA 1999) (holding that where injured plaintiff's offer only required tender of a check for a policy's limits, insurer's inclusion of a release to be executed did not constitute a counteroffer or rejection of that offer). Given Ms. Pena's offer's explicit limitation for the scope of the release, and USAA's expansion of that scope in its response, it would be a far stretch to characterize this as a term of implicit understanding between these parties.

2. Types of Acceptance

A. Bilateral vs. Unilateral Offers

Because the offeror is master of the offer, the offeror may designate how the offeree must accept. The offeror may only care about performance of the requested action, such as would be the case "I will pay you $25 if you cut my lawn." At this point, ask yourself what happens if the offeree does not cut the lawn? Is he in trouble for not cutting the lawn? May the offeror hire someone else? Would it matter if the offeree said, "I promise that I will cut your lawn?" What is different if the offeror instead says, "I will pay you $25 if you promise to cut my lawn by Saturday before my garden party?" In this case, what happens if the offeree fails to cut the lawn?

The answer to these questions elucidates the distinction between unilateral and bilateral contracts. The former expects *performance*, and while an offeror does not have to pay an offeree who does not perform, the offeror cannot complain when an offeree does not perform. Rather, the offeror is free to make an offer to someone else. This is an implicit expectation for an offer of a reward. In contrast, where the offeror requests a *promise* from an offeree to complete a performance, an offeree's failure (assuming of course that the offeree has in fact accepted) establishes a breach of contract for which the offeror is entitled to damages. The following cases attempt to make clear this distinction.

KOLODZIEJ v. MASON

United States District Court, M.D. Florida, Orlando Division, 2014.

996 F. Supp. 2d 1237

CHARLENE EDWARDS HONEYWELL, District Judge.

This cause comes before the Court on the Motion for Summary Judgment (the "Motion") filed by Defendants James Cheney Mason ("Mason") and J. Cheney

Mason, P.A. (“Mason Law Firm”) (collectively, “Defendants”). (Dkt. 72.) Plaintiff Dustin S. Kolodziej (“Kolodziej” or “Plaintiff”) filed a Response to the Motion (“Response”) (Dkt. 79) and Defendants filed a Reply to Plaintiff’s Response (“Reply”) (Dkt. 85). Oral argument on the motion was held on September 24, 2013. Upon due consideration of the parties’ submissions, including deposition transcripts, affidavits, stipulation of facts, memoranda of counsel and accompanying exhibits, and the oral argument of counsel, and for the reasons that follow, Defendants’ Motion will be granted.

1. BACKGROUND

3. Undisputed Facts [footnote omitted]

The central issue before this Court is whether a unilateral contract was formed between Defendants and Plaintiff Kolodziej. This purported contract arose as a result of a capital murder trial that took place in Bartow, Florida. (Dkt. 89, Joint Final Pretrial Statement (“JFPS”) ¶ 9A; Dkt. 79–3, Deposition of James Cheney Mason (“Mason Dep.”) 10:23–11:11.) Mason, whose law firm is J. Cheney Mason, P.A., was one of the attorneys who represented the criminal defendant, Nelson Serrano (“Mr. Serrano”), in that trial. *Id.*; Dkt. 72, Ex. 1, Declaration of J. Cheney Mason (“Mason Aff.”) ¶¶ 2–3. Mr. Serrano was accused of murdering four people in central Florida about 60 miles away from Orlando on December 3, 1997. (JFPS ¶ 9B.) The trial attracted heavy media interest and, as a consequence, during the trial, NBC News conducted an interview with Mason regarding the case. (Mason Dep. 21:23–22:2, 22:13–23:2, 33:12–34:2; Mason Aff. ¶ 5; Dkt. 72, Ex. 2, Declaration of William S. Knight, III (“Knight Aff.”) ¶ 3; JFPS ¶ 91.) During that interview, Mason talked about certain aspects of the prosecution’s theory that seemed highly implausible to him. (Dkt. 76, Stipulation, Jt. Ex. 3, NBC News Mason Interview DVD (“Unedited Mason Interview”).

On the day of the murders, Mr. Serrano could be seen on a security camera at a La Quinta hotel in Atlanta, Georgia several hours before and after the murders had taken place. (JFPS ¶ 9C.) At his trial, Mr. Serrano alleged that he could not have committed the murders in Florida between the times that he was seen on the La Quinta hotel security camera in Atlanta. *Id.* ¶ 9D. The prosecution’s theory of the case was that: 1) on the morning of December 3, 1997, Mr. Serrano slipped out of the Atlanta hotel after having been recorded on the security camera there; 2) he flew by airplane under an assumed name (“Juan Agacio”) from Atlanta to Orlando; 3) he drove from the Orlando International Airport (“Orlando Airport”) to Bartow where he committed the murders; 4) he subsequently drove from Bartow to the airport in Tampa, Florida; 5) he flew from Tampa back to Atlanta on Delta flight number 1272 under another assumed name (“John White”) in a coach seat in Row 30 or 32; and 6) from the Atlanta Hartsfield International Airport (“Atlanta Hartsfield Airport”) where his plane landed, returned to his La Quinta hotel that evening

where he once again could be seen on the hotel video camera recording. (Mason Aff. ¶ 3; JFPS ¶¶ 9C, E; Mason Dep. 37:11–24; Unedited Mason Interview.)

The purported unilateral contract was based on Mason's comments during the NBC interview regarding the last part of the prosecution's theory concerning Mr. Serrano's purported travel from the Atlanta Airport back to his La Quinta hotel. *See* Unedited Mason Interview. The prosecution's theory regarding this last leg of the Serrano trip was that Mr. Serrano was able to travel from the time that his Delta plane landed at the Atlanta Airport (referred to by Defendants as "wheels down") to his La Quinta hotel lobby in only 28 minutes. (Mason Aff. ¶¶ 3–4; Mot. Hr'g Tr. 9, Sept. 24, 2013; Unedited Mason Interview.) Mason commented during his interview that it was "not possible" for someone to accomplish this trip in the allotted 28 minutes. *See* Unedited Mason Interview. Just prior to Mason's comments regarding this last leg of the trip, Mason talked about how he believed it was "highly improbable" for Mr. Serrano to have traveled from the Orlando Airport to the crime scene in Bartow and commit all of the murders within one hour and thirty minutes as the prosecution theorized. *Id.* Mason, in general, expressed his disbelief that anyone could have committed these murders between the two times Serrano was seen on the La Quinta hotel video camera. *Id.* It was against this backdrop that Mason commented on the last leg of the Serrano trip, as follows: [footnote omitted]

> CHENEY MASON, ESQ.: … And, of course, just as importantly is—is the business of getting back to Atlanta, and getting from—landing in Atlanta and getting to the—to [the] hotel in 28 minutes.
>
> DENNIS MURPHY [footnote omitted]: Airport hotel.
>
> CHENEY MASON, ESQ.: Well, no, it's not at the airport. It's five miles away. You—how many times [have] you gone through the airport in Atlanta?
>
> DENNIS MURPHY: More than I'd like to think.
>
> CHENEY MASON, ESQ: I mean you know you're going to die there. You're going to be born again and die at the Atlanta Airport. You have to go through Atlanta to go anywhere, right?
>
> DENNIS MURPHY: What's the old joke about going to Heaven.

CHENEY MASON, ESQ: Yeah. You go through—through Hartsfield International.

DENNIS MURPHY: Change at Hartsfield first.

CHENEY MASON, ESQ: Right. And—and so we know that when you land and—and—in Atlanta, depending on which concourse you're landing in, you're going to have to wait to get off the airplane. Even if you're [in] first class. They usually put the thing behind you so you got to wait till half the plane gets off anyway. You got people boxed in—the lady with the kids in the carriage. Or people getting down their bags. Or the fat one can't get down the aisle.

I mean, whatever the story is, you've got delays in getting off the airplane. So if you've got a landing time, you don't get off the airplane at that time. When—when have you ever gotten off an airplane in Atlanta in less than 10 minutes. It's not going to happen. Then what? Then you have to go from whatever gate you are, down to the middle, to go down the el—the escalators, to catch the subway train to the terminal.

Wait for that. Wait while it stops in the meantime. People getting on and off. Get to that. Go up again, the escalators. Get to where you're in the terminal, out the terminal to ground transportation. And from there to be on the videotape in 28 minutes. Not possible. Not possible. I challenge anybody to show me, and guess what? Did they bring in any evidence to say that somebody made that route, did so? State's burden of proof. If they can do it, I'll challenge 'em. I'll pay them a million dollars if they can do it.

DENNIS MURPHY: If they can do it in the timeline (or time allotted).

CHENEY MASON, ESQ: Twenty-eight minutes.
...
Can't happen. Didn't happen. So what's the explanation. Somebody else. Does that mean necessarily that Mr. Serrano had nothing to do with any of it? Giving again the argument in the best light of the State and the Jury's suspicion. Not necessarily. But did they prove the case they charged—they proved beyond a reasonable doubt. Absolutely not. Couldn't have happened in that way.

* * *

([footage of] [a]irplane; inside airplane; airplane; highway; surveillance videotape of Serrano at hotel)

Mr. MASON: I challenge anybody to show me—I'll pay them a million dollars if they can do it.

MURPHY: If they can do that in the time allotted.

Mr. MASON: Twenty-eight minutes, can't happen. Didn't happen.

* * *

4. Unilateral Contracts

Whereas a bilateral contract is one in which there is an exchange of promises between two parties to the contract, a unilateral contract is an exchange of a promise for an act or forbearance. *Ballou v. Campbell*, 179 So.2d 228, 229–30 (Fla. 2nd DCA 1965). Mutual assent, or agreement, between the parties is necessary for the formation of any contract. *Gibson v. Courtois*, 539 So.2d 459, 460 (Fla.1989) ("Mutual assent is an absolute condition precedent to the formation of [a] contract. Absent mutual assent, neither the contract nor any of its provisions come into existence."). However, it is the expression of mutual assent or apparent assent, and not the mental assent itself, that is essential to forming a contract. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla.1985); *see also Med–Star Cent., Inc. v. Psychiatric Hospitals of Hernando Cnty., Inc.*, 639 So.2d 636, 637 (Fla. 5th DCA 1994) (holding that the parties' subjective intent is not material in determining whether a contract was formed). Thus, "an objective test is used to determine whether a contract is enforceable." *Robbie*, 469 So.2d at 1385. While courts should not completely ignore the actual and proven assent of either of the parties, the law generally imputes to a person an intention corresponding to the reasonable meaning of his words and acts. *Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Co.*, 215 So.2d 336, 338 (Fla. 4th Dist.Ct.App.1968) ("In the construction of contracts[,] the intention of the parties is to govern. Such intention is ordinarily deduced from the language employed when the same is without ambiguity."); *see also Kipp v. Kipp*, 844 So.2d 691, 693 (Fla. 4th DCA 2003) ("[A]bsent any evidence that the parties intended to endow a special meaning in the terms used in the agreement, the unambiguous language is to be given a realistic interpretation based on the plain, everyday meaning conveyed by the words. [A] court must construe a contract in a manner that accords with reason and probability; and avoid an absurd construction.").

Courts determine whether the parties expressed their assent to a contract by analyzing their agreement process in terms of offer and acceptance. *Jackson v. Inv. Corp. of Palm Beach*, 585 So.2d 949, 950 (Fla. 4th DCA 1991). Under an

objective test, “the true interpretation of an offer or acceptance is … what a reasonable person in the position of the parties would have thought it meant.” *Id.* (internal quotations omitted).

As noted above, an offer in a unilateral contract calls for acceptance by performance or forbearance. *Southampton Dev. Corp. v. Palmer Realty Group, Inc.*, 769 So.2d 1113, 1115 (Fla. 2nd DCA 2000). This case deals with a particular type of offer within the unilateral contract context—a public offer of a reward. In terms of “offers of a reward, ... [t]he offer is a mere proposal or conditional promise which, if accepted before it is revoked, creates a binding contract.” *Jackson*, 585 So.2d at 950; *see also Slattery v. Wells Fargo Armored Serv. Corp.*, 366 So.2d 157, 158 (Fla. 3rd DCA 1979) (“a reward is contractual in nature, requiring the acceptance of an offer supported by consideration.”); *Sumerel v. Pinder*, 83 So.2d 692, 693 (Fla.1955) (“Rewards are contractual.”). These cases are often referred to as “prove me wrong” cases as they entail an offer of payment to anyone who can prove the offeror wrong regarding a particular claim. The most famous of these cases is from the Court of Appeal of England and Wales. There, the appellate court upheld the trial court’s decision that a company advertisement that offered to pay a specified reward “to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the [Carbolic Smoke] ball threes time daily for two weeks, according to the printed directions supplied with each ball” was a valid offer. *Carlill v. Carbolic Smoke Ball Co.*, (1983) 1 Q.B. 256 (Court of Appeal). Examples of other notable cases include: 1) a boast made on national television that the famous outlaw Jesse James had not been killed in 1882, as most people thought, and that $10,000 would be given “to anyone who could prove me wrong.” *James v. Turilli*, 473 S.W.2d 757, 758–59 (Mo.Ct.App.1971). On appeal, the court held that a valid contract formed when the plaintiffs demonstrated, at trial, that James had been killed in 1882, *Id.* at 761; 2) the Eighth Circuit’s affirmation of a district court’s decision that a tax protestor’s assertion on a television news program that “[i]f anybody calls this show ... and cites any section of this [tax] Code that says an individual is required to file a tax return, I’ll pay them $100,000” was a valid offer. *Newman v. Schiff*, 778 F.2d 460, 461–63, 466 (8th Cir.1985); and 3) a statement before a state gambling commission regarding punchboard legitimacy by the vice president of a corporation that distributed punchboards that he would “put a hundred thousand dollars to anyone to find a crooked board.” *Barnes v. Treece*, 15 Wash.App. 437, 438, 549 P.2d 1152 (1976). He went on to state, “[i]f they find it, I’ll pay it.” *Id.* The court found this to be a valid offer for a unilateral contract even though his statement elicited laughter from the audience that was present during the proceedings. *Id.*

* * *

The Court has determined that no unilateral contract was formed between Defendants and Kolodziej because Kolodziej was unaware of the “challenge” in the Unedited Mason Interview at the time he attempted to perform it and

because the Edited Mason Interview that he did hear was not the same in substance as the unedited version he did not hear. Therefore, the Court need not address Defendants' remaining arguments—that Mason's communication did not constitute an offer and that, in any event, Kolodziej did not adequately perform the "challenge."

* * *

Editorial Note: The *Kolodziej* opinion cites *Carlill v. Carbolic Smoke Ball Co.* as (1983) 1 Q.B. 256. The correct year is **1893**, the year the English Court of Appeal decided this landmark case. The citation in the original published opinion has been preserved without alteration.

Note

When considering rewards, readers may recall discussion of advertisements in Chapter 1. Private offers require that they be communicated to the offeree such that it may be said that the offeree knew of the offer prior to a purported acceptance. In some jurisdictions, the communication requirement may be relaxed in the case of public offers of reward – those who perform the expected activity for the reward need not establish as their burden of proof that they actually knew of the public offer of reward. Performance alone would seem to be enough. In such jurisdictions, the reason would be the public policy of encouraging good behavior such as facilitating the apprehension of criminals. *See, e.g., Drummond v. U.S.*, 35 Ct. Cl. 356 (1900) (the motive should not be taken into account – only the performance). Takers of bar exams with national-testing aspects should be aware of this rule and policy. However, it would appear that Florida common law may still require knowledge of the offer/reward, although the cases tend to concurrently involve complicating factors, such as a government official's pre-existing legal duty. *See Slattery v. Wells Fargo Armored Service Corp.*, 366 So. 2d 157 (Fla. Dist. Ct. App. 3d 1979).

As you can imagine, reward situations and "free gift" situations have been active areas for attempted fraud. Courts have created rules to avoid the worst of abuses; many states as well have legislated to prohibit particularly deceptive practices. Where states have consumer protection legislation, takes of state bar portions of a state bar exam are well advised to be aware of at least some of the major ones, such as the "free gift" kind mentioned earlier in this Chapter.

(1). Unilateral Offers

TROUT v. APICELLA

District Court of Appeal of Florida, Fifth District, 2012

78 So. 3d 681

GRIFFIN, J.

* * *

Trout was seriously injured while a passenger in a truck operated by Apicella and owned by Medlar. The truck was insured by a Geico automobile insurance policy, issued to Medlar. The policy had a $100,000 limit for bodily injury liability per person, a $300,000 limit for bodily injury per occurrence, and a $50,000 limit for property damage liability. The Geico policy also provided uninsured motorist coverage and automobile medical payments coverage. Apicella was also covered by a Geico automobile insurance policy, which provided $100,000 in liability coverage for bodily injury damages.

A day after the accident, Geico forwarded a letter to Trout, enclosing a check for $100,000. The check was made payable to Trout and the hospital where he was receiving medical treatment. Also enclosed were proposed releases of all claims. Trout obtained counsel, Ronald K. Zimmet, Jr. ["Zimmet"], who sent a letter to Geico confirming his representation of Trout and requesting that Geico forward a statement, under oath, pursuant to section 627.4137, Florida Statutes, concerning available insurance. The next day, Geico sent a letter to Zimmet, enclosing an "Affidavit of Coverage" and a copy of the insured's insurance policy. Also enclosed were two checks to Trout for $100,000 each, representing the policy limits of the bodily injury liability coverage under both Medlar and Apicella's policies.

On April 8, 2008, a Geico representative sent a letter to Zimmet, enclosing amended proposed releases and stating that he was pleased the parties were able to reach an amicable settlement. In response, Zimmet wrote Geico advising that "NO SETTLEMENT HAD BEEN REACHED" and that much investigation and research remained undone. Zimmet also disputed Geico's assertion that the new releases did not create any new terms or conditions, pointing out that the new release contained a new releasee, Richard Lecates, who was not on the original proposed release. On April 17, 2008, Zimmet sent a letter to Geico requesting a written statement that there was no excess or umbrella coverage for Apicella on this or any other policy.

Geico responded by correspondence to Zimmet that Medlar did not have any excess insurance on the vehicle. This letter also represented that a Geico representative had spoken with Medlar, who confirmed that he did not have

any excess insurance on the vehicle involved in the loss, nor did he have an umbrella policy.

A few weeks later, Geico, again by correspondence, advised Zimmet that it had determined that Richard Lecates was not an insured on the policy and was not required to be on the release. The letter instructed Zimmet to revert to the previously provided original release.

On July 30, 2008, Zimmet wrote to Geico, stating that Trout wished to resolve his uninsured motorist claim. The letter requested that Geico tender all of the company's available uninsured motorist benefits within fifteen days of the date of the letter if Geico wished to settle. The letter also asked that Geico advise him if the company waived its rights of subrogation. Geico denied this demand based on its assertion that Trout was not entitled to UM coverage. [footnote omitted]
Zimmet sent another letter to Geico on October 31, 2008, containing an offer to settle:

> To begin with, according to the coverage itemization sheet you previously sent to my office, your company provides $10,000 of medical payments coverage under policy number 2011120652. However, I cannot verify the coverage from the insurance information that you sent to me or determine whether my client qualifies for the medical payments coverage. I have the attached coverage itemization sheet and a "Florida Family Automobile Insurance Policy" booklet so you can see what I have.
>
> Since my client was a passenger in an insured vehicle, presumably he would be entitled to medical payment benefits. But, as happened with the uninsured motorist coverage, your company may have a different position.
> I have also received your company's replacement checks,.... If you need me to return the expired checks, please let me know.
>
> With respect to the release, you and another claim representative previously sent over two separate sets of release forms. In order to avoid any misunderstanding, my client will only sign one release. *So just send me a single bodily injury release of your insureds only without any additional language that would require my client to pay their defense costs for claims by third parties. If I have valid checks for all bodily injury liability insurance available to your insureds, along with that release and the complete statutory insurance disclosures, within fifteen days of this*

> *letter, my client will sign the release and those claims will be settled*.
> (Emphasis added).

* * *

Trout's settlement offer was an offer for a unilateral contract that required performance by Geico.

> With respect to the release, you and another claim representative previously sent over two separate sets of release forms. In order to avoid any misunderstanding, my client will only sign one release. *So just send me a single bodily injury release of your insureds only without any additional language that would require my client to pay their defense costs for claims by third parties. If I have valid checks for all bodily injury liability insurance available to your insureds, along with that release and the complete statutory insurance disclosures, within fifteen days of this letter, my client will sign the release and those claims will be settled*.

* * *

REVERSED and REMANDED.

Note

The crux of the trial court's ruling is its conclusion that Geico could accept Trout's offer by merely offering to perform, but the language of the offer is clear. Trout's offer to settle his bodily injury claim required that Geico provide Trout with the following items within fifteen days of the date of the offer: 1) valid checks for all bodily injury liability insurance coverage; 2) one release for the bodily injury claim *only* that released Geico's insureds without any indemnification language; and 3) the complete statutory insurance disclosures. The offer made clear that in order to accept the offer, Geico had to meet all of the terms of the offer, and only then would the bodily injury claim be settled. Performance was an essential requirement for the acceptance of Trout's offer. Instead of performing, however, Geico proffered a release that did not just fail to meet the terms of Trout's offer, it blatantly failed. Not even Geico contends that a "Release of All Claims" was what Trout had offered. Geico's offer to consider any release amendment and explanation Trout might suggest was inadequate and the disclaimer of "new terms" ineffective. Whether, ultimately, the $200,000 in bodily injury coverage may

prove to be the only available coverage is beside the point. Trout had the absolute right to make an offer that preserved other claims and his counsel was prudent to do so. The burden of redlining, revising, redrafting or annotating the non-compliant release was not within Trout's offer. Geico's offer (probably) to change the release was, at best, a promise to perform, which is not sufficient here to create a binding contract. We cannot credit Geico's contention that Trout's offer was ineffective to require performance because it did not explicitly identify itself as a unilateral contract. The language of the offer communicates how it is to be accepted.

(2). Bilateral Offers

WRIGHT & SEATON, INC. v. PRESCOTT

District Court of Appeal of Florida, Fourth District, 1982.

420 So. 2d 623

GLICKSTEIN, Judge.

This is an appeal from a final judgment entered against an employer insurance agency in favor of the agency’s former employee. We reverse and remand.

Appellant is a general insurance agency which has been in business for over forty-five years in Palm Beach County. It employed appellee in May of 1978 and paid him a salary of $14,000 per year. In early 1979 appellee received a raise of $1,000, and on May 1, 1979, he and appellant executed an employment agreement.

By the terms of the agreement, appellant employed appellee for one year, reserving the right to terminate his employment at any time, with or without cause, upon written notice. Appellee’s salary was raised to $20,000 per year and he was to receive ten percent of net commission income on new business he produced. In return he was to perform such executive, administrative, sales or other duties as appellant assigned to him. Appellee also agreed not to engage in a business similar to or in any way competitive with the business of appellant or to solicit appellant’s customers during his employment and for three years following termination thereof. [Footnote omitted]

Although the parties performed their agreement for over eleven months, appellee testified that in December of 1979, he had discussed the possibility of other employment with one of appellant’s former employees. At the time, they projected that appellee could work for the former employee were the latter to open an insurance agency and appellee to resolve the conflict created by his covenant not to compete with appellant. On April 16, 1980, fourteen days

before the agreement expired, appellee delivered to appellant a letter of resignation, effective as of the end of the month, in which he stated the agreement was "void for failure of consideration, inadequate consideration, and lack of mutuality." Immediately two letters were sent to appellee on behalf of appellant. One expressed regret and advised that appellant's management had intended to extend the agreement. The other accepted appellee's resignation immediately, rather than as of the end of the month.

Appellee then went to work for the new agency appellant's former employee had established in West Palm Beach. Appellant filed a complaint and the trial court, after conducting an evidentiary hearing, issued a temporary injunction. At trial, however, the court dissolved the injunction, dismissed the complaint with prejudice, and retained jurisdiction to assess appellee's damages.

I

It was the trial court's opinion that appellee's covenant not to compete was unenforceable because the agreement lacked mutuality, which we interpret to mean a lack of mutuality of obligation. [footnote omitted] One of the most illuminating discussions we have come across with respect to "mutuality of obligations" appears in *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 688 (3d Cir. 1924):

> As an unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract. It is applicable, however, to a bilateral contract containing mutual executory promises because there both parties are bound by reciprocal obligations and the promise of one is the consideration for the promise of the other. If for any reason the promise of one party is not binding upon him, it is not a sufficient consideration for the promise of the other and the contract is void for want of consideration. *Velie Motor Car Co. v. Kopmeier*, 194 F. 324, 114 C.C.A. 284; *Bernstein v. W.B. Mfg. Co.*, 238 Mass. 589, 131 N.E. 200. The terms "consideration" and "mutuality of obligation" are sometimes confused. "Consideration is essential; mutuality of obligation is not unless the want of mutuality would leave one party without a valid or available consideration for his promise. The doctrine of mutuality of obligation appears therefore to be merely one aspect of the rule that mutual promises constitute considerations for each other. Where there is no other consideration for a contract, mutual promises must be binding on both parties. But where there is any other consideration for the contract, mutuality of obligation is not essential." See also *Bales v. Journeymen Barbers', Hairdressers', Cosmetologists' & Proprietors'*

> *International Union Local No. 867*, 239 So.2d 624 (Fla. 4th DCA 1970); 17 C.J.S. *Contracts* § 100 (1963).

We start out with the proposition that, in this case, the parties entered into a bilateral contract containing mutual executory promises.…

* * *

IV

We further conclude the facts of this case would not support a finding of overreaching or coercion. The employer clearly had a legal right to include in the agreement a covenant not to compete as evinced by sections 542.12(1) and (2)(a). [footnote omitted] In sanctioning anti-competition provisions, the Legislature undoubtedly considered that one of the bargaining parties would always be the employer and that the economic position of the employer generally would be superior to that of the employee. As was said in *Tasty Box Lunch Co.*:

> To hold that the agreement is unenforceable because the bargaining parties were not on equal terms would void nearly all such agreements and this would defeat the purpose of the statute. *Id.* at 54. Further, any so-called harshness of a covenant not to compete disregards the consideration flowing to the employee. Accordingly, the issues of overreaching, coercion, and harsh result merely because of the per se existence of a covenant have been put to rest.

Nevertheless, our having reversed, on remand the trial court must determine the issue of reasonableness of time and area and fashion an injunction in an appropriate manner. Having expressed our intent, the trial court is directed to proceed in accordance therewith.

HERSEY, J., and DANIEL S. PEARSON, Associate Judge, concur.

Problem 2-4

Smith offered to pay Jones $1,000 if Jones painted Smith's front porch by the end of the month. What kind of offer is this? What if Jones never painted the garage? If Smith hires McDonald to paint the garage where Jones fails but it costs $2,000, may Smith sue Jones for the extra $1,000, i.e., has Jones breached? Would it be different if Smith had Jones promise to paint her front porch before the end of the month, because Smith knew that Jones was the best painting contractor around? What kind of contract would this one be?

Can you intuit which contractual element of the four set out in Chapters I-VII is relevant in one of these situations but not in the other? *See* the first CMM Approach in Chapter I and related material.

Note

The first sentence of the federal case quoted in the *Wright & Seaton, Inc.* case raises a very interesting issue. Unilateral contracts call for performance, which is easily verified as having been properly completed or not. Bilateral contracts call for return promises, which at least in part are based on yet unfulfilled obligations, i.e., the subjects of some of the promises. Perhaps it is the inchoate rights of yet unfulfilled promises, which could require time for performance before they can be verified, that necessitates a fourth element, i.e., the "meeting of the minds" or "mutuality." Because the fourth element is not required for unilateral contracts as it would seem to be for bilateral ones, Florida's choice of fourth element ("sufficient specificity of essential terms," and not "meeting of the minds" or "mutuality") is a reaction to the fact that the fourth element of other states does not typically address this distinction. Someday, there may still be four elements according to Florida law, but the "definiteness" requirements would be handled in the offer and acceptance phases, respectively, and there would be a fourth "meeting of the minds" or "mutuality" element only in the case of bilateral contracts.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 2

7. The components of acceptance
8. What does and does not constitute a proper communication of acceptance
9. The concept of silence as acceptance
10. The difference between unilateral and bilateral offers (acceptance by performance or by return promise)
11. Affirmative defenses, such as existence of a prior settlement agreement

SUGGESTED EXERCISE(S)

(5) Have students close their books and computers at the beginning of class to gauge their level of preparation (or after class to gauge their retention of materials). Prepare a question that poses definition(s) contained within this

Chapter, and ask the students to write an explanation of why the distinction between the definitions is important. Have the students take out a piece of paper and write down their answer, then have them meet in small groups to discuss their answers. After a short period of time, have the students rewrite their answers on the other side of the paper. Inquire whether and how the students' answers improved after discussions in the small groups.

(6) Using the language of Restatement (Second) § 69, have students work individually and come up with a factual hypothetical for each scenario when silence may operate as an acceptance. Select small groups of students, and have them compare and exchange the examples they came up with. Ask whether there are more ways that silence may act as an acceptance that were not mentioned in footnote 16 of *Nationwide Mutual Fire Insurance Co.* (Skill: creating fact triggers for issue-spotting purposes).

Chapter 3: TERMINATION OF THE POWER OF ACCEPTANCE

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As readers may have noted, the contract-formation element *acceptance* requires more than a single chapter to fully cover the topic. Chapter II addressed the components of an acceptance. This Chapter deals with the ways by which an acceptance may be terminated. Offerors, as masters of the offer, determine who may accept an offer and how long the offer remains open. Sometimes an offer clearly indicates who may accept (e.g., “Jim, I offer to sell to you, and only to you, my vintage Dodge Charger.”). In other cases, the intended offerees are implied. For example, if an offer is made at a meeting of

colleagues, the likely offerees are those attending the meeting. For offers such as rewards, which are unilateral, the intended offeree is wide open, i.e., it is to anyone who first performs the requested act (e.g., “I will pay $500 for return of my lost dog Cuddles.”). Just as important is the time within which an intended offeree may accept an offer. Whether expressly stated or implied under the circumstances, all good offers come to an end – following which an offeree is no longer empowered to accept. Where the temporal end of an offer’s validity is set out, it is easy to determine its lapse such that the power of acceptance has been terminated. If an end to an offer’s validity is not stated, courts would infer an end after a reasonable time under the circumstances. Furthermore, certain occurrences are treated as a terminating event – their occurrence implies an end to the offer period. Some offers are contingent on some event, the non-occurrence of which suspends an offeree’s power to accept an offer unless and until the event occurs. All of these concepts are addressed in this Chapter.

We will also introduce the role of the Restatement of Contracts. There are now two editions, designated (First) and (Second), and priority should be given to the latter since it is the most recent, and therefore the most current pronouncement on what the law is or should be. This demonstrates a chronological importance. Moreover, courts may apply various sources of law to contracts cases, with differing levels of precedential importance. This is another nuance with which readers must become familiar. Obviously, more recently issued pronouncements of law take precedence over prior statements of the same law. But what about the relationship between different sources of law? Some rules must be applied, such as pronouncements of the state Supreme Court where the issues and facts have already been addressed and ruled upon. This primacy is often indicated by use of words such as *binding* or *authoritative*. Other rules may be applied, such as opinions from other District Courts of Appeal than the one in which a controversy is being litigated. These would be trumped, or course, by rulings in that particular District which state something different. Still others are suggestions which, where there are no rules higher up the chain of hierarchy, may also be applied to fill a void in direct, binding precedent. Though it takes some time to grasp, readers will need to develop a sense of the hierarchy. Analogy to card games may help. In poker, two aces beat two kings. In euchre, the right bauer trumps the left bauer, trumps the on-suit ace, etc. Lawyers must base their case on the strongest law possible. In short, we introduce the Restatement (Second) of Contracts as a non-binding but helpful source of law which in this case helps to make outlining of how offers conclude relatively simple.

1. Termination of the Power of Acceptance

A brief discussion of the importance of terminology is in order. Words bear specific legal meaning, and the ability to use the right word for the right concept may win or lose a contracts case. When an offer ends after its time

runs out, the typical phraseology is that the offer has *lapsed*. If an offeror withdraws an open offer before it has lapsed or otherwise ended, that offeror has *revoked* the offer. Where an offeree wishes to indicate that he or she declines to accept an offer, such offeree has *rejected* the offer. Where an offeree proposes to accept but only on condition that new terms are made part of the agreement, such response, no longer a "mirror image" of the offer, is treated as a *counteroffer*, which acts as a *rejection* of the offer. Several activities or occurrences *terminate the power of acceptance* in the offeree. Lapse of time on an open offer and the death or incapacity of either party are such occurrences. A revocation or rejection/counteroffer are specific, extra acts and one may use a more active verb of rejection (by an offeree) or revocation (by an offeror) if preferred. Use of proper terminology instills confidence in the graders of bar exams.

A. Rejection & Counteroffer

RIBICH v. EVERGREEN SALES & SERVICE, INC.

District Court of Appeal of Florida, Second District, 2001

784 So. 2d 1201

NORTHCUTT, Judge.

* * *

While bicycling on September 8, 1998, Ribich suffered serious injuries in a collision with a truck owned by Evergreen and driven by Baldorossi. Shortly after the accident, Hartford Insurance Company claims specialist Jim Castellani met Ribich's wife at the hospital and learned that Ribich was in the military. After this meeting, he sent a letter to Ribich on October 9, 1998, offering to pay Hartford's $50,000 policy limits to settle the claim. The settlement offer had two conditions: the execution of a release and the execution of a no-lien affidavit, both of which were transmitted with the letter. The no-lien affidavit required Ribich to affirm under penalty of perjury that he had not been treated in any veteran's hospital and that he had not received any medical care at the government's expense. On January 11, 1999, Castellani received the executed release, but Ribich had not signed or returned the no-lien affidavit. That day Castellani wrote to Ribich stating that Hartford could not issue the $50,000 draft without an executed no-lien affidavit.

On February 2, 1999, Mrs. Ribich advised Castellani by telephone that neither she nor her husband wanted to execute the no-lien affidavit. As a U.S. Naval officer, Ribich would have been committing perjury had he signed it. Castellani spoke with Mrs. Ribich the next day and confirmed that Hartford was not going to waive execution of the no-lien affidavit as a condition of settlement.

On February 9, Castellani spoke with Ribich's attorney, Denise Vaughan, and again advised that Hartford would not settle the case unless the Ribiches executed the no-lien affidavit. Vaughan, likewise, reiterated her clients' refusal to sign the affidavit and demanded that Hartford deliver its settlement check the next day. However, no check was sent.

* * *

Settlement agreements are governed by the law of contracts. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla.1985). The party seeking judgment based on a settlement has the burden of establishing assent by the opposing party and must establish that there was a meeting of the minds or mutual or reciprocal assent to certain definite propositions. *Id.* To result in a contract, an acceptance of an offer must be absolute and unconditional, identical with the terms of the offer and in the mode, at the place and within the time expressly or impliedly required by the offer. *Sullivan v. Econ. Research Props.*, 455 So.2d 630, 631 (Fla. 5th DCA 1984). A counteroffer operates as a rejection of a preceding offer. *Padron v. Plantada*, 632 So.2d 113 (Fla. 3d DCA 1994).

In this case the circuit court ruled that the Ribiches' counteroffer to accept the liability limits without executing the no-lien affidavit remained outstanding on February 22, when Hartford accepted it by delivering the check. We disagree. The Ribiches' last offer to settle on those terms was made February 9, and it was conditioned on Hartford delivering the settlement check the next day. Instead, the next day Hartford proposed an additional settlement condition, i.e., that Ribich furnish medical authorizations. The Ribiches rejected this counteroffer. Although Vaughan and Albine discussed the claim on February 15, the record does not reflect the making of any offers or counteroffers during that conversation. Thus, as of February 22 there were no outstanding settlement offers by either party. Hartford's delivery of the check without requiring a no-lien affidavit evinced a new settlement offer which the Ribiches were not obliged to accept. Therefore, the circuit court should have denied the defendants' motion for summary judgment on their settlement defenses and should have granted the plaintiffs' motion.

Reversed and remanded for further proceedings.

WHATLEY, A.C.J., and DAVIS, J., concur.

Note

There are important distinctions between *rejections*, *counteroffers*, and what may be called *mere inquiries*. The legal implications are crucial. Where an offeree rejects an offer, i.e., says, "No," the offer is closed and the offeree cannot come back to accept on the original terms. Readers should be aware of the oft-tested issue of a *renewed offer*. If, for example, an offeror offered to sell his motorcycle for $5,000 and the offeree said, "No," sometimes the offeree comes back with something like, "Well, would you think about it for a few days?" Where the offeror does something like this, it 'renews' the offer

and the offeree is then in a position to accept it. After a rejection, the deal is off and the parties are considered as having ended discussions.

Counteroffers act as rejections. Once a counteroffer is made, the initial offer is closed. An interesting metamorphosis will have occurred. Whereas the offer is closed and can no longer be accepted, the parties will have switched positions; the counteroffer makes the former offeree the new offeror. In contrast to a rejection, the making of a counteroffer keeps the negotiations alive. One of the initial decisions that readers must make when determining contract formation is (1) which is the offer, and (2) which is the response to the offer. In certain cases, this is far from clear. The legal repercussions of which is the offer and which is the response to that offer are case changers. One tactic utilized by business people is to try to be the offeror, because since the offeror is master of the offer, his or her terms control the mechanics of the contractual relationship. Readers may recognize that this is the origin of the famous "Battle of the Forms" concept of U.C.C. § 2-207, addressed in the next Chapter. Several other examples will be provided later in this Chapter.

Mere inquiries neither act as acceptances nor as rejections (or as counteroffers). Where an offer is still open, a mere inquiry keeps the negotiations alive which provides further opportunity for the offeree to accept the original offer. If an offeror offers to sell a motorcycle for $6,000, and the offeree returns with, "Would you accept $4,000?," the offer is probably still open. Assuming that the offer had not yet lapsed or been withdrawn or terminated for some other reason, the offeree could come back and secure the purchase by saying, "Well, I thought about it, and $6,000 is actually a good price, so I will pay you $6,000." The offeree would, under these circumstances, still be able to accept the offer and to bind the offeror to turn over the motorcycle for the payment of $6,000. This would depend of course on whether too much time had passed between offer and final acceptance.

B. Time Lapse – Open Option

RACING PROPERTIES, L.P. v. L.T. BALDWIN
District Court of Appeal of Florida, Third District, 2004
885 So. 2d 881

RAMIREZ, J.

Racing Properties, S.P. appeals the entry of an order in which the trial court granted appellee S.T. Baldwin, III's motion to enforce the parties' mediated settlement agreement. Baldwin cross-appeals the trial court's ruling that the default interest under the terms of the parties' underlying agreement stopped accruing the day in which funds were escrowed. We reverse because there is no enforceable contract upon which a mediated settlement agreement could be enforced, and thus dismiss the cross-appeal.

Baldwin loaned Racing Properties the sum of $3.2 million. When Racing Properties defaulted on the loan, Baldwin filed a lis pendens. Racing Properties then sued Baldwin to quiet title and Baldwin counterclaimed for an equitable mortgage.

At the subsequent mediation, the parties reached an "agreement in principle." For the agreement in principle to take effect, a number of conditions had to be satisfied. One of these conditions required certain documentation to be completed by May 10, 2001. The parties understood that time was of the essence. Baldwin in turn agreed to cancel the lis pendens and dismiss the litigation. The trial court eventually discharged the lis pendens.

Between May 9 and September 28, 2001, Baldwin attempted to renegotiate the terms of the agreement in principle. Baldwin, for example, requested additional collateral not provided for in the agreement in principle. He also attempted to continue the litigation which he had agreed to dismiss. Indeed, Baldwin appealed the discharge of the lis pendens. This Court denied the appeal. [Footnote omitted].

On September 28, 2001, Baldwin moved to enforce the agreement in principle. The trial court's order that granted Baldwin's motion to enforce now forms the basis of this appeal.
We find that the agreement in principle was executory in nature and did not become effective when key aspects of the agreement were not complied with. Under well established contract law, a condition precedent is a condition which calls for the performance of an act after a contract is entered into, upon the performance or happening of which its obligation to perform is made to depend. *See Cohen v. Rothman*, 127 So.2d 143, 147 (Fla. 3d DCA 1961). It is elementary that there must be at least a substantial performance of conditions precedent in order to authorize a recovery as for performance of a contract. *Id.* Furthermore, the alteration of one of the material terms of a contract constitutes a counter-offer and rejection of said contract. *See Padron v. Plantada*, 632 So.2d 113, 114 (Fla. 3d DCA 1994).

Under the facts before us, the agreement in principle did not become binding because one of the express conditions precedent was not met. Paragraph 4 of the agreement in principle states: "[t]he documentation shall be completed by May 10, 2001." On May 9, 2001, Racing Properties transmitted the required documentation to Baldwin. Baldwin was to complete the required documentation by the next day. Baldwin did not complete the required documents prior to the agreed upon deadline of May 10. Racing Properties thereafter granted Baldwin an extension until May 17, 2001, within which Baldwin could comply. Baldwin again failed to comply. To ignore one term of the agreement, but uphold the others, would be tantamount to the creation of a new contract. We thus agree with Racing Properties that Baldwin's failure to

timely complete the required documents nullified the enforceability of the contract.

* * *

We therefore reverse the trial court's order enforcing the mediated settlement agreement. In addition, we dismiss Baldwin's cross-appeal, finding no need to address the issues raised.

Notes

5. As stated earlier, one of the goals of the authors is to provide brief explanations of certain important legal concepts that are often used in contracts cases but are not explained. In the last case, the lender sued the borrower for payment. The lender also recorded a notice of *lis pendens*. Question: why do we use the past tense of the verb "to record" rather than the verb "to file?" The answer to this explains the purpose of a notice of *lis pendens*. The term is Latin for "a suit is pending." Readers who have taken a property course may recall that real property recording systems provide notice to one and all of an interest in real property, whether it be a sale, the granting of an easement, or other property interest. This "record" notice ensures that no one taking an interest in the same real property can be an innocent purchaser for value without notice of a prior interest. For example, a roofer may secure a construction lien for work done on a house. *See* FLA. STAT. § 713.001 (2017) *et seq.* (construction liens, and also the subsection from 713.50 and following, which set out a host of other lien types not related to real property and its improvement). By recording a notice of *lis pendens*, any subsequent acquisition of an interest in the affected real property would be subject to such claim, subject of course to the success of the underlying lawsuit for which the notice was recorded.

6. Another term of art utilized in the *Racing* Properties case is *executory contract*. The term is explained in a Note in Chapter 4. It is essential to learn important terms, and how they operate in contract law. This book tries to point out some of the more important ones in a way that facilitates learning and does not overwhelm. Understanding of executory contracts is not particularly crucial for understanding the points made in this Chapter, but it is an important concept that contracts lawyers must master.

7. In the last Chapter, the *Kendel v. Pontius* case was excerpted to demonstrate the requirement of an acceptance that it be communicated.

Left out of the excerpt was the sentence, “The right to withdraw and repudiate the acceptance of an offer is dependent upon the initial determination of when that acceptance is effective and irrevocable.” Offerors can in fact make offers irrevocable for a period of time such that the offeree is the only party in position to accept the offer. It is irrevocably “open” – readers should become accustomed to refer to the irrevocable kind as “option contracts.” There are good reasons for these. Perhaps an offeree needs to check his savings to determine whether there is enough to make a purchase, and the offeree wants the offer to remain open for a period of time so as to exclude anyone else from being able to purchase the item. Whether this would be permitted is, however, up to the offeror.

8. At this point, readers are alerted to the fact that there are two forms of “irrevocability” of which they must be aware. The first involves the common law of contracts. The second involves the sale of goods. Although there are significant similarities between the two, there are important differences: the first is in the nature of how the exclusive time to accept (the “option”) was made, and the second is for how long the irrevocability is granted. A careful reading of the Restatements (Second) version and the U.C.C. Article 2’s version is needed (note that the Florida version is set out below, but readers should recall that it is no different than the U.C.C. Article 2’s version found in § 2-205).

RESTATEMENT (SECOND) OF CONTRACTS

§ 25. Option Contracts

An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

* * *

§ 87. Option Contract

(1) An offer is binding as an option contract if it

(7) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

(b) is made irrevocable by statute.

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

672.205 Firm offers. — An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed 3 months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

At common law, an option contract required separate consideration, a topic addressed in Chapters V and VI herein. The reason is that there are two potential contracts: (1) the first is for the item or service offered for sale, lease, etc.; and (2) the second is for the exclusive right to accept within the amount of time agreed, or if not stated, within a reasonable time under the circumstances. For example, one may pay $5,000 to have an artisan paint the garage… and one should also pay a non-refundable deposit, or even buy a beer, in payment for a period of time for which the offeree has the exclusive right to accept a promise to paint.

The sale-of-goods version requires separate consideration unless the maker of the exclusive time period to accept is a merchant. In such case, the writing is enough. Thus, the differences are that for a merchant, a signed writing is enough and the reasonable time it remains irrevocable, if not clearly set out, is for a reasonable time *not to exceed 3 months*. If the maker of the offer of exclusive time to accept is not a merchant, then the common law applies. The Restatement (Second) Contracts now has a similar provision, but there are differences.

The common law still requires consideration, but the consideration may be "purported" if it is in writing. What this means is that if there is a writing stated that consideration has been paid for the option, the writing to this effect operates as sufficient proof. In times past, the offeror was able to try to prove that the consideration for the option was never paid, and therefore that the offer was "open" and therefore "revocable." Now, the writing alone is sufficient to hold the offer open so long as it states consideration as well as the fact that it was paid, whether it was actually paid or not. In times past, such "option" could be unraveled by proof that the stated consideration was not actually supplied.

C. Revocation by the Offeror

MONTONE v. BUSH

District Court of Appeal of Florida, Second District, 1964

167 So. 2d 884

WILLSON, J. H., Associate Judge.

The decree of specific performance, from which this appeal is prosecuted, is based, in part, upon the chancellor's finding that the appellant had not effectively withdrawn or revoked his written offer to purchase a parcel of realty owned by appellees. The chancellor held, as a matter of law, that appellant should have communicated his withdrawal or revocation of the offer to purchase directly to the appellees, rather than to appellees' agent.

The listing agreement authorized the broker 'to sell the property' at the price of $26,000 'or at any other price and terms acceptable to me.' This implies an authority to communicate an offer at a price or terms different from those in the listing contract, and, in fact, this is what occurred. Authority to communicate an offer to purchase carries with it authority to communicate a withdrawal or revocation of the offer.
The general rule is that where an offer has not been accepted by the principal, a communication of withdrawal, or revocation, to the principal's agent is sufficient. 3 C.J.S. Agency § 265. We can find no reason for an exception to this rule in the case of real estate brokers, even though they are special rather than general agents.

* * *

SMITH, C. J., and WHITE, J., concur.

Problem 3-1

Jokester tells Gullible, "I will give you $500 if you cut my lawn by Friday." Gullible likes the idea and agrees if it does not rain all week. The next morning, Jokester calls Gullible to tell him that the deal is off and that he lives in a condominium that has its own lawn service. Does Gullible have a claim to the $500?

Problem 3-2

Jokester tells Gullible, "I will give you $500 if you cut my lawn by Friday." The very next day, Gullible takes his lawnmower to Jokester's place and cuts a third of the lawn before Jokester runs out of the building to tell him about the trick he tried to play and tells Gullible to leave (without his $500, of course). Does Gullible have any claim to the $500 in this case? Reference to Restatement (Second) Contracts § 45 may prove helpful.

Problem 3-3

Jokester tells Gullible, “I will give you $500 if you cut my lawn by Friday.” That night, Gullible sharpens his mower blades and fills his gas can to take with him when he goes to cut the lawn. Jokester calls and tells Gullible about the trick and warns him not to go to Jokester’s place. Does Gullible have any claim to the $500 in this case? Reference to Comment f of Restatement (Second) Contracts § 45 may prove helpful. (Advice: Restatements and U.C.C. Articles have helpful commentary about applications of law to specific facts deriving from past cases – Comment f is known as the “mere preparations” exception to the § 45 implied-in-law option contract which ensues from the commencement of performance).

Note

Florida does not appear to have case law on the issue whether an indirect revocation of an offer is nonetheless operative. National casebooks include cases such as *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876). It was decided in a chancery court in England, which exercises equity jurisdiction, an important legal concept left to a later Chapter. In *Dickinson*, an offer was effectively revoked when the offeree learned through his agent that the offeror had sold real property to another buyer, effectively revoking the offer to Dickinson. The leaving of a purported acceptance with Dodds’ mother-in-law after learning of the sale to another buyer was ineffective. What would happen if a Florida court was faced with an indirect revocation question like the one in *Dickinson*? The commonly used elements of *indirect revocation* are: (1) indirect receipt of correct information, (2) from a reliable source, and (3) about acts of an offeror that a reasonable person would understand to indicate that the offeror no longer wishes to enter into the contract with such prior offeree.

D. Death or Incapacity of the Offeror or Offeree

There is a dearth of Florida case law for the premise that the death of either the offeror or the offeree terminates the power of acceptance, whether known or unknown to the other party. However, one Florida Supreme Court case quotes a famous treatise on contracts (Williston’s famous treatise on Contracts) with approval, and the quoted language includes mention of the idea that the death (or incapacity of either revokes an offer. A brief excerpt of *Morrison v. Thoelkemailbox rule*. It would appear that revocation of an offer and termination of the power of acceptance are two sides of the same coin; they seemingly have the same effect. In this regard, a word on terminology is in order. Where an offer is *open* (i.e., able to be accepted, but also revocable prior to acceptance), the offeror may revoke it. All other actions that remove an offeree’s right to accept are less directly active, and therefore it may be best to utilize verbiage to the effect that the ability to accept has been terminated (by lapse of time, by action of the offeree rejecting an offer or

making a counter-offer). In other words, an offeror *revokes* an open offer, an offeree *rejects* (or counter-offer rejects) an open offer, and all other activities *terminate the power of acceptance*.

There appears to be no Florida case law directly indicating that the onset of a qualifying incapacity (mental illness, etc.) terminates an offer (or, again, revokes the power of acceptance).[3] However, it is possible to craft the argument from ruling on a somewhat similar point in a Florida Supreme Court case. Additionally, the Restatement (Second) Contracts § 48 provides as follows: "[a]n offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract." While it is not possible to say that Florida law specifically recognizes that the incapacity of either party prior to an acceptance pulls the plug on contract formation, one can refer to cases in other jurisdictions, or to the Restatement (Second) Contracts as persuasive and therefore applicable to a case yet to be decided.[4] By reference to existing language in a Florida Supreme Court case and to Restatement (Second) Contracts 'best practices,' it should be fair to say that Florida does, or will, recognize that the death or incapacity of either the offeror or the offeree revokes the offer/terminates the power of acceptance. Admittedly, the precedential value leaves much to be desired, and the *Hogan v. Supreme Camp of the American Woodman* ruling is therefore offered with some caution.

Though state laws may differ to some degree on what terminates the power of acceptance, readers in search of "black letter law" or a numbered list to memorize need look no further than the subsections of Restatement (Second) Contracts §§ 35-49, with special focus on § 36, as the list utilizes the others to explain that list and to flesh out the main rules and exceptions for this area of law.

CMM Approach: At this juncture, it is worthwhile to point out a distinction in contracts law that manifests itself in more than one area. Thus, we offer another CMM approach to note the difference between a formation problem and a post-formation or enforcement problem. It is this kind of distinction that separates those who pass from those who do not on bar exams, and those who convince a court to rule favorably from those who are unable to do so. Compare these two concepts: The first is the question whether an offer is revoked/power of acceptance in offeree is terminated by the death of either. As noted in the text above, the answer is 'yes.' The second is the question whether a formed contract remains in force in the case of death or the onset of an incapacity. If agreement has been reached by two parties before the death of either party (or the subsequent development of an

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incapacity of either), why not allow the estate, or the family, or the probate administrator, to enforce a favorable contract on the one hand, or to honor an obligation made by a decedent on the other? Simply stated, a formation problem invalidates contractual intent and unravels a developing agreement, but a post-formation problem does not. The same distinction is vital to the question of integration and the parol evidence rule, set out in Chapter 16. Readers will learn that the parol evidence rule bars the introduction of prior or contemporaneous agreements into a contractual arrangement that is integrated, i.e., intended to be full and final. A good example would be the prohibition of allowing evidence of a prior email with a price of $15 to argue that the contract price of $16 clearly set out in an agreement was in fact a mistake. The parol evidence rule does not, however, apply to prior evidence used to prove a problem with formation, such as fraud, duress, or undue influence. Later, in Chapters XXIV – XXVI as well as in Section V below, readers will learn about defenses to enforcement. The latter presume formation of a contract, but are interposed to prevent the enforcement of one party's rights under the contract. Contrast this to determining that there was a lack of formation, and therefore not only no contract but no rights under the contract. This tectonic dichotomy will be addressed throughout this casebook.

(1). Death of the Offeror or Offeree

MORRISON v. THOELKE

District Court of Appeal of Florida, Second District, 1963

155 So. 2d 889

* * *

A near identical statement of the general rule is found in 1 Williston, Contracts § 81 (3rd ed. 1957):

> 'Contracts are frequently made between parties at some distance and therefore it is of vital importance to determine at what moment the contract is complete. If the mailing of an acceptance completes the contract, what happens thereafter, whether the death of either party, the receipt of a revocation or rejection, or a telegraphic recalling of the acceptance, though occurring before the receipt of the acceptance, will be of no avail; whereas, if a contract is not completed until the acceptance has been received, in all the situations supposed no contract will arise.
>
> * * *

(2). Incapacity of the Offeror or the Offeree

HOGAN v. SUPREME CAMP OF THE AMERICAN WOODMEN

Supreme Court of Florida, Division A, 1941.
146 Fla. 413

ADAMS, Justice.

The plaintiff sued to recover the full death benefit of defendant's certificate issued to plaintiff's wife.

The defendant, a fraternal insurance society, pleaded in substance that recovery should be limited by one half, for that the original certificate was subject to any subsequent change in the defendant's constitution and by-laws; that the certificate was issued in 1933; that it lapsed in 1939 and was reinstated within four months time by defendant subject to certain limitations of liability imposed by its by-laws enacted subsequent to issuance and before lapsation, and also upon the holder's express agreement in writing wherein she and defendant contracted that in consideration of defendant's waiving additional proof of good health she would be reinstated according to all subsequent amendments; one of which provided that should the holder die of heart disease within one year after reinstatement the liability would be limited to one half. The plea alleges that the holder died within two months after reinstatement of heart disease.

The original certificate permitted reinstatement within four months upon written evidence of good health satisfactory to defendant and payment of dues. Such reinstated certificate to be of the same effect as though it has never lapsed.

The lower court held the plea good on demurrer and the plaintiff declining to further plead final judgment was entered for plaintiff on the limited liability.

The case is here on writ of error by plaintiff and cross assignments of error by defendant.

We consider the legal sufficiency of the plea.

The subsequent changes in the defendant's constitution and by-laws limiting the benefits by one-half should death result within one year after reinstatement, from heart disease was in that respect an impairment of the original certificate. Therefore such amendment was of no effect as to plaintiff even though agreed to in advance. *Grand Lodge, Knights of Pythias of North America, South America, Europe, Asia, Africa and Australia, Jurisdiction of Florida, a Corporation, a Fraternal Benefit Association v. Eliza L. Harris*, 124 Fla. 1, 167 So. 814.

We now consider the legal sufficiency of the plea from the standpoint of an express agreement to alter and modify the original. A valid contract requires both capacity of the parties and consideration. The demurrer opens the entire

record and confesses all facts well plead. *Henderson v. Morton*, 109 Fla. 300, 147 So. 456. One of those facts was that the certificate holder was a married woman. The common law as interpreted by this Court does not recognize capacity in a married woman to contract. *Lewis v. Yale*, 4 Fla. 418; *Potter v. Florida Motor Lines, D.C.*, 57 F.2d 313; *Blood v. Hunt*, 97 Fla. 551, 121 So. 886; *Sumner v. Osborne*, 101 Fla. 742, 135 So. 513. *See also Holden v. West Florida Dev. Co.*, 103 Fla. 487, 137 So. 271, 691, *Le Noir v. McDaniel*, 80 Fla. 500, 86 So. 435. Construing the plea against the pleader we find the contract that of a married woman and therefore unenforceable against her. For that reason the plea was bad in law.

* * *

BROWN, C. J., and WHITFIELD and BUFORD, JJ., concur.

Note

Under common law, and pursuant to a doctrine called *coverture*, married women in Great Britain and in the North American colonies did not have separate legal existence apart from their husbands. Women who had property prior to marriage would have the rights in it transferred to their husbands upon marriage. Thus, and this had been corrected, females were said not to have the *legal capacity* required for contracting, transfers of land, etc. Mississippi may have been the first to codify some form of a Married Women's Property Act in the late 1830's. Other states followed, by legislation or by inclusion in their respective state constitutions. The State of Florida, however, lagged behind. Virginia Postrel, *It Was Not So Long Ago That Married Women Had No Property Rights*, N. Y. Times, Aug. 9, 2001 at C2. *See, generally,* 5 WILLISTON ON CONTRACTS § 11:5 (West, 4th ed. 2009). In 1943, the State of Florida, by statute, recognized women's rights to own, hold title to, manage, sell, convey, and otherwise control her own personal and real property. *See* FLA. STAT. § 708.08 (2017) and its legislative history.

There is a very important distinction that arises in relation to legal capacity. Some forms of legal incapacity that are treated as a complete inability to form a contract – and any contract executed by such incapacitated persons is *void*. This would seem to make the legal capacity in such cases an actual element of formation (i.e., element five of contractual formation: legal capacity to enter into a contract). However, there are other forms of legal incapacity that make contracts *voidable*, i.e., the person suffering from some form of legal incapacity has the option of voiding (terminating) a contractual relationship, or of enforcing the bargain. In the latter situation, the legal capacity is a *defense to enforcement*, not something that prevents *contract formation*. The nuances between void and voidable contracts based on legal incapacity are

somewhat murky and will be further addressed in Chapters XXIV – XXVI covering defenses to contract enforcement. At this juncture, it is recommended to use the four elements of contract formation set out in Chapter 1. However, since the fifth element of *legal capacity* prevents formation in some (but not all) cases, at least brief recognition may be in order.

E. Non-Occurrence of a Condition

SURGICAL PARTNERS, LLC. v. CHOI
District Court of Appeal of Florida, Fourth District, 2012
100 So. 3d 1267

MAY, C.J.
"What is sauce for the goose is sauce for the gander."

This case returns to us in an appeal from an order awarding attorney's fees and costs. The award arose from the doctor's successful defense of the medical association's breach of contract claim. We previously affirmed the underlying summary judgment in favor of the doctor. We now reverse the order awarding fees.

The medical association filed a one-count breach of contract claim against the doctor seeking liquidated damages for the doctor's termination of an employment agreement. The doctor denied the claim. He successfully argued that the employment agreement was unenforceable because the medical association failed to provide the requisite written notice to commence the agreement term.

The trial court granted summary judgment in the doctor's favor, finding that the employment agreement was unenforceable. We affirmed the summary judgment. *See Surgical Partners, LLC v. Choi,* 88 So.3d 957 (Fla. 4th DCA 2012).

The doctor subsequently moved for an award of attorney's fees and costs, pursuant to the prevailing party fee provision of the employment agreement. At the hearing on entitlement, the doctor argued that notwithstanding that the employment agreement term never commenced and the liquidated damages provision was unenforceable, he was entitled to prevailing party fees because that provision of the agreement remained effective. In response, the medical association argued that the doctor was not entitled to attorney's fees if the agreement never commenced.

The trial court took the matter under advisement and subsequently entered an order granting entitlement to fees. In its order, the court wrote: "This was an agreement that did exist but [was] unenforceable due to the failure to send

written notice." The medical association moved for reconsideration and argued that a lack of notice was tantamount to a failure of a condition precedent. Therefore, there was no enforceable agreement and no prevailing party fees provision to apply. The trial court denied the motion for reconsideration.

The trial court subsequently entered a final judgment for attorney's fees and costs. From this final judgment, the medical association now appeals.

The medical association continues to argue that the attorney's fees judgment should be reversed because the employment agreement never took effect. The doctor responds that the employment agreement existed, but the liquidated damages provision was unenforceable due to the lack of written notice to commence. He suggests that the attorney's fees provision survived that defect.

We have de novo review of this contract as it relates to the issue of entitlement to attorney's fees. *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc.,* 53 So.3d 348, 355 (Fla. 4th DCA 2011).

> "[F]or the purpose of determining whether an award of attorney's fees is proper under a contract's prevailing party fee provision, 'there is a difference between contracts that never came into existence and contracts that exist but are later found to be unenforceable.' " *Tarr v. Honea,* 959 So.2d 780, 781 (Fla. 4th DCA 2007) (quoting *Fabing v. Eaton,* 941 So.2d 415, 418 (Fla. 2d DCA 2006)).

No binding contract is formed when a condition precedent to its formation never occurs. *Mitchell v. DiMare,* 936 So.2d 1178, 1180 (Fla. 5th DCA 2006). Here, the agreement plainly set out its term of operation in article two, which provides:

> The Agreement term shall initially be for five (5) years (the Agreement Term), commencing on the Effective Date, defined below.... *The Effective Date means the date that the Employee begins providing surgical services for the Company pursuant to this Agreement, which date shall be the date on which the Company commences active business operations, pursuant to a written notice to be delivered in accordance with Article 11, below ....* (Emphasis added).

Written notice was a condition precedent to formation. The medical association never sent that notice, which permitted the trial court to grant the doctor's motion for summary judgment. It was on this basis that we affirmed

the summary judgment. The doctor simply cannot avoid a liquidated damages provision by claiming the agreement never came into effect, or was unenforceable, and at the same time be entitled to attorney's fees under the same agreement. [Footnote omitted]. *See Blosser v. AADCO Enters., Inc.,* 526 So.2d 126, 126 (Fla. 5th DCA 1988)(affirming the denial of contractual attorney's fees where the defendant prevailed in a breach of contract action by asserting that plaintiff never performed the condition precedent to the contract). For this reason, we reverse and remand the case to the trial court to vacate the attorney's fees award. [Footnote omitted].

Reversed and Remanded to Vacate the Attorney's Fees Award.

STEVENSON and LEVINE, JJ., concur.

Problem 3-4

Olympia goes into a gym owned by Athena, a personal trainer, and tells her the following: “I’m offering to hire you to be my personal trainer, and I’m only willing to pay you $50/month.” Athena is taken aback by the low amount of Olympia’s offer. Athena replies, “No way, José. Training you for that little amount of money is completely not worth my time. Get lost.” Which concept of termination of acceptance does this cover?

Problem 3-5

Oliver sends Abe an email containing the following: “I’ll pay you $100/month to cut the grass in my yard and make sure that all of the gutters are cleared out.” Abe scoffs at the low amount of Oliver’s offer and sends him an email saying, “Ha! I can’t believe you think my services are only worth $100/month. I’ll do it for no less than $200/month.” Which concept of termination of acceptance does this cover?

Problem 3-6

Ophelia approaches Amanda, a licensed cosmetologist, on May 1 and says the following: “I need to have my hair and makeup done for my sister’s wedding! It’s in two weeks. I’ll pay you $300 for the full service. Let me know within seven days or else I’m going to have to find someone else to do it.” Amanda told Ophelia that she would think about it and get back to her. On May 9, Amanda sees Ophelia out at the grocery store and says, “I accept your offer to do your hair and makeup! I can’t wait!” Ophelia replied, “I’ve already hired someone else.” Which concept of termination of acceptance does this cover?

Problem 3-7

Owen calls Andrew and tells him the following: “I will pay you $800 to paint my garage. I’ll give you a few days to think about it if you’d like.” After contemplating it for a full day, Andrew decides that he wants to take the job. Right before Andrew calls Owen to tell him the good news, Owen calls him and says, “Sorry, Andrew. I have decided that I actually like the color of the garage, and I don’t want it painted anymore. Deal’s off.” Which concept of termination of acceptance does this cover?

Problem 3-8

Olivia wants to sell her car. The only catch is that she needs to buy a new car before she can sell her current car. Allen heard that Olivia is planning on selling her car, so he goes over to her house to inquire about it. Olivia is thrilled to have found a potential buyer, and says the following: “I’ll sell you my car on April 30 for $2,000, but I need to buy a new car before I can sell you this car.” Olivia, who has horrible credit, could not secure proper financing for a new car and thus could not purchase a new car before the 30th. On April 30, Allen is dropped off at Olivia’s house to purchase the car. Olivia tells Allen, “Sorry, Allen. Deal’s off. I feel like I’m going to be stuck with this car forever.” Which concept of termination of acceptance does this cover?

Problem 3-9

Olga wants to hire Alexander le Chef, a world-renowned chef, to cater her daughter’s wedding. Olga sends Alexander the following offer: “I will pay you $50,000 to cater my daughter’s wedding on February 14 of this year.” Alexander, who is also an avid thrill-seeker, decides that he will contemplate whether he wishes to accept the offer while climbing Mt. Everest. Unfortunately, Alexander slipped upon reaching the summit of the mountain and fell to his demise. Olga picked up her favorite tabloid magazine to discover that Alexander le Chef has died while climbing Mt. Everest. Which concept of termination of acceptance does this cover? Would it matter if Olga would have died? What about if Olga’s daughter died?

2. The Mailbox Rule

MORRISON v. THOELKE

District Court of Appeal of Florida, Second District, 1963

155 So. 2d 889

ALLEN, Acting Chief Judge

Appellants, defendants and counter-plaintiffs in the lower court, appeal a summary final decree for appellees, plaintiffs and counter-defendants below. The plaintiff-appellees, owners of certain realty, sued to quiet title, specifically requesting that defendant-appellants be enjoined from making any claim under a recorded contract for the sale of the subject realty. Defendant-appellants counterclaimed, seeking specific performance of the same contract and conveyance of the subject property to them. The lower court, after hearing, entered a summary decree for plaintiffs.
A number of undisputed facts were established by the pleadings, including the facts that appellees are the owners of the subject property located in Orange County; that on November 26, 1957, appellants, as purchasers, executed a contract for the sale and purchase of the subject property and mailed the contract to appellees who were in Texas; and that on November 27, 1957, appellees executed the contract and placed it in the mails addressed to appellants' attorney in Florida. It is also undisputed that after mailing said contract, but prior to its receipt in Florida, appellees called appellants' attorney and cancelled and repudiated the execution and contract. Nonetheless, appellants, upon receipt of the contract caused the same to be recorded. Additional factual allegations concerning demand for performance, tender of the purchase price and payment of taxes were disputed.

On the basis of the foregoing facts, the lower court entered summary decree for the appellees, quieting title in them. The basis of this decision was, in the words of the able trial judge:

> '[T]he contract executed by the parties hereto * * * constituted a cloud on the title of Plaintiffs. * * * The Court finds said contract to have been cancelled and repudiated by Plaintiffs prior to its receipt by Defendants * * * and that on this basis there was no legal contract binding on the parties * * *.'
>
> * * *

Treating the question as one arising under the laws of Florida and as a question of first impression in this jurisdiction, both parties have submitted briefs containing cogent argument and ample authority in support of their respective contentions. As the able trial judge observed, 'the authorities cited and relied upon * * * appear to be in conflict.'

The appellant, in arguing that the lower court erred in giving effect to the repudiation of the mailed acceptance, contends that this case is controlled by the general rule that insofar as the mail is an acceptable medium of communication, a contract is complete and binding upon posting of the letter of acceptance. *See*, e.g. 12 Am.Jur., Contracts § 46 (1938, Supp.1963); 1 Williston, Contracts § 81 (3rd ed. 1957); 1 Corbin, Contracts § 78 (1950

Supp.1961). Appellees, on the other hand, argue that the right to recall mail makes the Post Office Department the agent of the sender, and that such right coupled with communication of a renunciation prior to receipt of the acceptance voids the acceptance. In short, appellees argue that acceptance is complete only upon receipt of the mailed acceptance. They rely, inter alia, on *Rhode Island Tool Company v. United States*, 128 F.Supp. 417, 130 Ct.Cl. 698 (1955) and *Dick v. United States*, 82 F.Supp. 326, 113 Ct.Cl. 94 (1949).

Turning first to the general rule relied upon by appellant some insight may be gained by reference to the statement of the rule in leading encyclopedias and treatises. Accordingly, attention is directed to 12 Am.Jur., Contracts §§ 46, 49 (1938) for the following:

> '§ 46. Acceptance by Mail.-The formation of the contract may be made dependent upon the communication of the acceptance to the offerer, and in such a case there will be no contract if for any reason the offerer is not notified of the acceptance according to the agreement. In cases in which such an arrangement has not been made, the courts have been confronted by the rather difficult question whether the contract is completed when the letter of acceptance is mailed or when it is received by the offerer. There is no doubt that the implication that a complete, final, and absolutely binding contract is formed as soon as the acceptance of an offer is posted may in some cases lead to inconvenience and hardship. At the same time, it has been pointed out that an offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance and that if no answer to his offer is received by him and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. It has been suggested, moreover, that if the offerer is not to be bound by the acceptance until it is received by him, the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. Upon balancing convenience and inconvenience, the courts have deemed it more consistent with the acts and declarations of the parties to consider the contract complete and absolutely binding on the transmission of the acceptance through the post, as the medium of communication which the parties themselves contemplate, instead of postponing its completion until the acceptance has been received by the offerer. By treating the post office as the agency of both

> parties, the courts have managed to harmonize the legal notion that it is necessary that the minds of the parties meet with the equally well-established principle that a determination to accept is ineffectual if it is not communicated either actually or by legal implication. Accordingly, if acceptance by mail is authorized, the contract is completed at the moment the acceptor deposits in the post office the letter of acceptance directed to the offerer's proper address and with the postage prepaid, provided he does so within the proper time and before receiving any intimation of the revocation of the offer.
>
> * * *
>
> 'Of course, a letter which is written, but remains in the writer's hands or under his control, is not an acceptance.
>
> * * *

A near identical statement of the general rule is found in 1 Williston, Contracts § 81 (3rd ed. 1957):

> 'Contracts are frequently made between parties at some distance and therefore it is of vital importance to determine at what moment the contract is complete. If the mailing of an acceptance completes the contract, what happens thereafter, whether the death of either party, the receipt of a revocation or rejection, or a telegraphic recalling of the acceptance, though occurring before the receipt of the acceptance, will be of no avail; whereas, if a contract is not completed until the acceptance has been received, in all the situations supposed no contract will arise.
>
> * * *

A second leading treatise on the law of contracts, Corbin, Contracts §§ 78 and 80 (1950 Supp.1961), also devotes some discussion to the 'rule' urged by appellants. Corbin writes:

> 'Where the parties are negotiating at a distance from each other, the most common method of making an offer is by sending it by mail; and more often than not the offeror has specified no particular mode of acceptance. In such a case, it is now the prevailing rule that the offeree has power to accept and close the contract by mailing a letter of acceptance, properly stamped and addressed, within a

> reasonable time. The contract is regarded as made at the time and place that the letter of acceptance is put into the possession of the post office department.'

Like the editor of Williston, Corbin negates the effect of the offeree's power to recall his letter:

> 'The postal regulations have for a long period made it possible for the sender of a letter to intercept it and prevent its delivery to the addressee. This has caused some doubt to be expressed as to whether an acceptance can ever be operative upon the mere mailing of the letter, since the delivery to the post office has not put it entirely beyond the sender's control.
>
> 'It is believed that no such doubt should exist. * * * In view of common practices, in view of the difficulties involved in the process of interception of a letter, and in view of the decisions and printed discussions dealing with acceptance by post, it is believed that the fact that a letter can be lawfully intercepted by the sender should not prevent the acceptance from being operative on mailing. If the offer was made under such circumstances that the offeror should know that the offeree might reasonably regard this as a proper method of closing the deal, and the offeree does so regard it, and makes use of it, the contract is consummated even though the letter of acceptance is intercepted and not delivered.'
>
> * * *
>
> [Quoting *Rhode Island Tool Company v. United States*, 128 F.Supp. 417, 130 Ct.Cl. 698 (1955)] 'We are living in a time of change. The theories of yesterday, proved by practice today, give way to the improvements of tomorrow. 'To apply an outmoded formula is not only unjust, it runs counter to the whole stream of human experience. It is like insisting on an oxcart as the official means of transportation in the age or the automobile. The cart served a useful purpose in its day, but is now a museum piece. 'The old rule was established before Morse invented the telegraph as a means of communication. Commerce must have a breaking point upon which it may rely for the completion of a contract. At that time no faster mode of communication was known. But in the light of the faster means of communication the Post Office Department wisely changed the rule. The reason for

> the old rule had disappeared. This does not change any principle, it simply changes the practice to suit the changed conditions, but leaves unchanged the principle of finality, which is just as definite as ever, though transferred to a different point by the new regulation.
>
> * * *

The rule that a contract is complete upon deposit of the acceptance in the mails, hereinbefore referred to as 'deposited acceptance rule' and also known as the 'rule in *Adams v. Lindsell*,' had its origin, insofar as the common law is concerned, in *Adams v. Lindsell*, 1 Barn. & Ald. 681, 106 Eng.Rep. 250 (K.B. 1818). In that case, the defendants had sent an offer to plaintiffs on September 2nd, indicating that they expected an answer 'in course of post.' The offer was misdirected and was not received and accepted until the 5th, the acceptance being mailed that day and received by defendant-offerors on the 9th. However, the defendants, who had expected to receive the acceptance on or before the 7th, sold the goods offered on the 8th of September. It was conceded that the delay had been occasioned by the fault of the defendants in initially misdirecting the offer.

* * *

In the instant case, an unqualified offer was accepted and the acceptance made manifest. Later, the offerees sought to repudiate their initial assent. Had there been a delay in their determination to repudiate permitting the letter to be delivered to appellant, no question as to the invalidity of the repudiation would have been entertained. As it were, the repudiation antedated receipt of the letter. However, adopting the view that the acceptance was effective when the letter of acceptance was deposited in the mails, the repudiation was equally invalid and cannot alone, support the summary decree for appellees.

The summary decree is reversed and the cause remanded for further proceedings.

WHITE, J., and MOODY, JAMES S., Associate Judge, concur.

Notes

3. The distinction between an open offer, which is revocable, and that of an option contract (irrevocable for time stated, or if not stated, for a reasonable time) is important. The mailbox rule is a default rule. The offeror, as master of the offer, may designate when and how an offer may be accepted. Where an offer is silent on when it is accepted, a default rule has developed that acceptance is effective once it leaves

the control of the offeree – even before actual knowledge of it by the offeror. When an option to accept is granted, an offeror has already decided to follow a path different than the default, which treats offers as "open" and therefore revocable at the will of the offeror if properly communicated. In such cases, an acceptance is effective not on mailing but on receipt.

4. Technically a "consideration" problem addressed more fully in Chapter V, readers should be aware that the common law may imply an option contract and therefore the offeror's power to revoke. Where an offeror has led the offeree to believe that return consideration is assured if the offeree's task is completed, and palpable performance has commenced, the common law can imply an option contract providing the offeree a reasonable time to complete the performance. *See* Restatement (Second) Contracts § 90(1); *Ubersee Handels Gesellschaft, Inc. v. Semenjuk*, 540 So. 2d 136 (Fla. Dist. Ct. App. 5th 1989).

5. Earlier in this Chapter, we learned that the death or incapacity of either the offeror or the offeree terminates the offeree's power of acceptance. The question could arise, "Is this still true where the offeree has an option contract? (In other words, does death or incapacity of either also terminate an option contract, whose purpose is to provide the offeree time to exclusively consider the offer?). The answer should be "no." Where the main purpose is to buy time for the exclusive right to accept, which is the idea behind an option contract, then the death or incapacity of either should not terminate the right to accept where it is covered by such an option. Thinking of it another way, the option contract specifically buys an offeror's right to terminate, and would survive the death or incapacity of either. Know that each side to a contract will have an estate, where a trustee or administrator will wrap up the decedent's affairs. These trustees or administrators will be around to exercise post-mortem contractual rights.

CMM Approach: The *mailbox rule* was created at a time when a significant portion of contracting was done through the mail. The key concept is that the acceptance was put beyond the offeree's reach, such as in a post office box. Thus, an acceptance still sitting on the offeree's desk for mailing later in the day would not yet be an acceptance. Though still called the *mailbox rule*, today the operative event, i.e., that moment of a virtually irrevocable dispatch of the acceptance, might be to click "Send" for an email acceptance. Soon, the operative event could even be a Block Chain entry.

Problem 3-10

Owen, a local baker, sends Amelia, a young woman who wants to learn how to bake, a letter on August 1 that says the following: "I'm willing to teach you how to bake for $500. I'll give you until October 1 to decide whether you want to accept my offer if you'll give me $20 in consideration." Amelia, who was unsure but excited at the thought of learning how to bake, immediately sent Owen a check for $20 to have time to consider whether she wanted to accept the offer. After taking some time to think about it, Amelia mailed Owen a check on September 30 for $500 with a note that said, "I accept! I can't wait to begin my lessons!" Owen received Amelia's letter on October 2. Did Amelia accept Owen's offer? Why or why not?

3. Common Law or U.C.C. Article 2

Readers may have realized that the title to this note already contains an inaccuracy. As noted earlier in Chapter I, every state except perhaps one has adopted U.C.C. Article 2 and so it is the state's statutory adoption of Article 2 that would apply. Florida's adoption of Article 2 is nearly identical, and so readers are technically learning Florida law even while they are studying the U.C.C., i.e., a "model" code. Adding a "67-" before the U.C.C. Article 2 section and changing the hyphen to a period converts it to the Florida citation, e.g., U.C.C. Article 2, § 2-205 Firm offer is FLA. STAT. § 672.205 (2017).[5]

U.C.C. § 1-103(b) and FLA. STAT. § 671.103 (2017) both indicate that the provisions of the Uniform Commercial Code, including those in or derived from Article 2, apply to the sale of goods to the exclusion of the common law. They also direct courts to use the common law of contracts where these codes are silent, and set out specific areas that the codes do not cover, including formation problem such as legal incapacity, duress, misrepresentation, and bankruptcy. To be remembered is that while U.C.C. Article 2 sections apply to cases involving the sale of goods, some of them include special rules in cases involving a merchant or sometimes where both sides are merchants. As noted earlier in this Chapter, the firm offer is an example of the former. Readers should remember that a firm offer does not need separate consideration if it is in writing and made by a merchant; on the other hand, if a non-merchant offeror tries to create an option contract, it would require consideration (or qualify for an exception described earlier in this Chapter). The famous "Battle of the Forms" issue is addressed in Chapter IV, but readers may want to note at this point that one of its provisions (U.C.C. § 2-207(2), FLA. STAT. § 672.207(2) (2017), second clause) would apply where both the offeror and the offeree are merchants.

5

The U.C.C. Article 2 and Florida's adoption of U.C.C. Article 2 do not include many provisions on acceptance. Accordingly, use of common-law principles is proper. Since contract law is driven by state law, the hierarchy of sources, assuming that there is no state constitutional problem, would be by statute, including the Florida adoption of U.C.C. Article 2, followed by decisions of the Florida Supreme Court, followed by opinions of the appellate court for the district where the controversy is located, and thereafter to non-binding precedent, such as opinions from the other state appellate districts, federal pronouncements of the law, the laws of other states, legal treatises, etc. This hierarchy is subject as well to yet another dichotomy but its precedential organization remains unchanged. Where a statute exists but does not directly address the controversy at hand, it may have been interpreted by the courts, and the hierarchy of legal sources applies. Where no statute exists, common-law pronouncements are applied, again in the hierarchy mentioned.

The following excerpt, from a federal bankruptcy case involving Florida constitutional law and the Homestead Act, tracks this hierarchy of sources[6]:

> Accordingly, if the language of a state's homestead statute restricts its application to property located within the state, the statute cannot be given extraterritorial effect by this Court. If the plain language of a state's homestead statute is silent as to its extraterritorial effect, the Court will look to that state's case law precedent to determine if the state's homestead statute can be applied to property outside of the state. If the state's homestead statute is silent as to its extraterritorial effect and there is no case law precedent determining the propriety of its extraterritorial application, the Court believes it is appropriate to interpret the state's homestead law to apply extraterritorially based upon the strong policy of liberally construing exemptions in favor of the debtor as espoused by the Eighth and Ninth Circuit Courts of Appeal. [Footnote omitted]. *In re Jevne*, 387 B.R. 301 (S.D. Fla. 2008).

To make this point, readers may want to pay attention to how many times the provisions of U.C.C. Article 2 cover concepts involving "consideration." (We know of several, at least one of which will be flagged in Chapter IV). In the absence of U.C.C. Article 2 coverage, case pronouncements of the common law on contracts will apply. As an example in the area of "acceptance," U.C.C. § 2-206(1)(b), FLA. STAT. § 672.206(b) (2017) and U.C.C. §§ 2-606(1)-(2), FLA. STAT. §§ 672.606(1)-(2) (2017) are the only ones to squarely address issues of acceptance. Accordingly, the common law supplements these U.C.C. Article 2 sections for matters such as acceptance by silence, lapse of time, etc.

6

A. Mixed Contracts with Goods & Services - Majority

ALLIED SHELVING & EQUIPMENT, INC., v. NATIONAL DELI, LLC

District Court of Appeal of Florida, Third District, 2015

154 So. 3d 482

ROTHENBERG, J.

Allied Shelving and Equipment, Inc. (“Allied Shelving”) appeals the trial court's final judgment in favor of National Deli, LLC (“National Deli”) on National Deli's breach of contract claim and against Allied Shelving on its counterclaims arising from the same contract. Because the issue presented is a factual one and no trial transcript has been provided, we affirm.

Allied Shelving contracted with National Deli to provide and install a pallet rack system, essentially a series of very large shelves, in National Deli's warehouse. Both parties ended up dissatisfied after the deal was done, and each claimed that the other had materially breached the contract. The trial court found in National Deli's favor on its breach of contract claims and against Allied Shelving on its breach of contract claims. The parties did not opt to have the trial proceedings transcribed, so no transcript has been provided to this Court. Allied Shelving's primary contention on appeal is that the trial court erred by applying the common law of contracts rather than Article II of Florida's Uniform Commercial Code (“UCC”). [Footnote omitted].

Article II of the UCC applies only to transactions in goods, *see* FLA. STAT. § 672.102 (2011); it does not apply to contracts for services, which are governed by the common law. *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1328 (11th Cir.1998) (applying Florida law*); Dionne v. Columbus Mills, Inc.*, 311 So.2d 681, 683 (Fla. 2d DCA 1975). “Goods” are statutorily defined as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 678) and things in action.” FLA. STAT. § 672.105(1) (2011). The term “services,” conversely, is not defined in the UCC, but generally refers to some sort of manual labor or personal utility rather than a physical object that has been sold or purchased. *See BMC Indus.*, 160 F.3d at 1329–32 (discussing and analyzing various cases that have held a contract to be for either goods or services). If the provision of the pallet rack system is a transaction in goods, best described as the sale of shelving units as Allied Shelving argues, the UCC would apply, and the trial court erred. If, however, the contract for the installation of the pallet rack system is a contract for services, best described as the design, manufacture, and installation of those shelving units, then we must affirm.

Determining whether a contract is for goods or services, however, is not a completely binary choice. Many contracts, commonly referred to as "hybrids," involve transactions for both goods and services. *BMC Indus.*, 160 F.3d at 1329. Whether the UCC or the common law applies to a particular hybrid contract depends on "whether the[ ] predominant factor, the [ ] thrust, the[ ] purpose [of the contract], reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)." *Id.* at 1330 (*quoting Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir.1974) (footnotes omitted)). In such instances, the determination whether the "predominant factor" in the contract is for goods or for services is a factual inquiry unless the court can determine that the contract is exclusively for goods or services as a matter of law. *Birwelco–Montenay, Inc. v. Infilco Degremont, Inc.*, 827 So.2d 255, 257 (Fla. 3d DCA 2001) (citing *BMC Indus.*, 160 F.3d at 1331).

The contract in this case is clearly a hybrid contract involving goods (the sale of the shelving unit materials) as well as services (the manufacturing and installation of the shelving units). Based on the final order, it appears the trial court determined that the services portion of the contract was the predominant factor in the agreement. [Footnote omitted]. Without a trial transcript, we cannot find that the trial court reversibly erred when making this factual finding. *See Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla.1979) ("Without a record of the trial proceedings, the appellate court can not [sic] properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory."). Accordingly, we affirm the trial court's order in all respects.

Affirmed.

Note

When determining which law to choose in cases of hybrid contracts, the *predominance test* balances factors such as: (1) the language of the contract indicating which is more important; (2) the nature of the supplier's business, and (3) the relative value of the goods compared to that of the services involved.

B. Mixed Contracts with Goods & Services - Minority

Some states split up the aspects of a contract that are for goods from those of services. For the former, the courts of these jurisdictions would apply U.C.C. Article 2 rules to the former (supplemented as necessary by the common law where Article 2 does not cover an issue) and common law rules to the latter.

When most states' courts follow a particular rule, it is in the "majority." Those jurisdictions whose courts follow another rule are of course in the "minority." An example, albeit with perhaps some exceptions, is Florida courts' use of the "mirror image" rule explained in Chapter 2. The majority of states, as championed by the Restatement (Second) Contracts and U.C.C. Article II (covered in Chapter IV), prefer if not require use of the "responsive" test for acceptances. Takers of the MBE should remember that the MBE tends to test on the more modern general rules.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 3

12. Open offers compared to option contract offers
13. The concept of *lis pendens*
14. Acceptance effective on dispatch compared to situations where it is effective on receipt
15. The ways to revoke or reject an offer and other ways to terminate the power of acceptance
16. Differences between common law and U.C.C. Article 2 sale of goods, generally and in connection with option contracts versus firm offers

SUGGESTED EXERCISE(S)

4. Legal hierarchy: Using large font, type a list of legal sources (state constitution, state statutes, District Court of Appeals, Rest. 2d (Contracts), federal district court opinions, etc.). Cut into individual strips and rearrange randomly to create several identical packages. Separate students into several groups and give each group a set of strips and some tape. Instruct the students to organize the strips into their hierarchical importance by taping them accordingly on a whiteboard or blackboard. Perhaps allow groups to use a marker in order to set out short explanations, draw lines and arrows, etc. Have a spokesperson from each group explain the reasons behind their organizational charts. This exercise may be targeted to state contract law.

Chapter 4: BATTLE OF THE FORMS, GAP-FILLERS, & CONTRACTUAL FLEXIBILITY

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This Chapter is the third chapter to address issues of the acceptance element. It is not that this element is more important than the offer (which was covered in a single chapter), but perhaps because it is the first contractual element to officially introduce a second party to the contractual relationship, there would appear to be more dynamics and therefore more factual scenarios to address. Before going any further, it is important to identify an important tenet in contract law. What if two parties have been negotiating a major contract for months and the final version covers everything but the nature of how the object of the contract is packaged for shipping? Has a deal yet been struck? Or can either party walk away because the terms of the agreement have not been finalized? Are things still within the negotiation phase, or has agreement been reached, perhaps with the implication of some of the smaller, non-essential terms, such as packaging for nearly indestructible metal parts for shipment to a buyer? Often, parties have reached binding agreement on both sides even though not all aspects of the contractual relationship have been finalized. The intent may be that all non-agreed terms of a more minor nature are to be handled afterward, by the party with the duty to act reasonably or in accord with the same practices utilized in prior contractual activities by the same parties. Sometimes, a hyperbolic example drives home the point. What if two businesses negotiate the sale of widgets for $1 million, but the nature of how payment is to be made is not clearly expressed? If the buyer brings a certified check (i.e., a bank has already received the amount, and writes its own check – it is a form of guaranteed payment), would that be acceptable, or could the other party (perhaps because it got cold feet on the purchase and is looking for a reason to renegotiate) argue that the deal is off because payment terms were not finalized? What if the buyer brings a suitcase full of cash to seller's bank and invites the seller to show up and put the cash into seller's account? (By way of contrast, what would be different if the buyer brought a check drawn on her personal, not her business's account?).

In the past, courts tended to follow legally-formalistic policies when deciding contracts cases. Parties to a contract would need to establish, factually, all elements and all components of elements in order for a contract to be formed. Courts have often made clear in the past that they would not create or rewrite the terms of a contract. *See, e.g.*, *Beach Resort Hotel Corp. v. Wieder,* 79 So. 2d 659, 663 (Fla. 1955). This philosophy is still alive and well. *See, e.g. Hill v. Deering Bay Marina Assoc., Inc.* 958 So. 2d 1162 (Fla. Dist. Ct. App. 3d 2008). On the other hand, courts have encountered factual scenarios where application of rigid rules and requirements was the wrong thing to do (as implied in the fact situations of the last paragraph). *See, e.g., Burger King Corp. v. Weaver,* 169 F.3d 1310, 1315 (11th Cir.1999), *cert. denied,* 528 U.S.

948, 120 S.Ct. 370, 145 L.Ed.2d 287 (1999*); Barnes v. Burger King Corp.*, 932 F. Supp. 1420, 1438 (S.D.Fla.1996); *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997). *But cf. Insurance Concepts and Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232 (Fla. Dist. Ct. App. 4th 2001) (implied duties are not to be recognized when they would conflict with specific contractual terms or where they are not related to some express duty in the contract but to something more abstract). It is in these situations where courts began to recognize mechanisms to permit a bit more flexibility in order to reach reasonable rather than unreasonable results, both in common-law and in sale-of-goods contractual situations. One of the best examples of this movement toward more flexibility to reach reasonable results is Article 2 of the Uniform Commercial Code. Recall from Chapter III that the U.C.C. was created and is occasionally amended by scholars and experts trying to establish common, best practices. The entire U.C.C. Article 2 demonstrates acceptance of reasonableness, which is perhaps best exemplified in the following:

> **§ 1-103. Construction of Uniform Commercial Code to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law**.
>
> (a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.
>
> (b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.[7]

Problem 4-1

To demonstrate the point being made in the introduction to this Chapter, the authors included subsection (b) of U.C.C. § 1-103 immediately above, although it was not specifically necessary to make the point at this time. There is a vitally important reason, which was addressed briefly in Chapter 1. Can you recall what that point is?

[7]

Note

An expert's understanding of contract law requires integration of quite a few rules, exceptions, factual distinctions, policies and choices of law (for example, whether for sale of goods or for common law topics such as for services). This takes time, but ultimately one is left with an inherent understanding which to neophytes may seem like magic – until it all "clicks." Many casebooks cover all of these facets well, but leave an integrated understanding of it all to a natural process that depends on prior experience, mental acuity, and the nature and level of study. As noted in the Introduction, a driving force of this casebook is to provide more direct and more clear treatment of these myriad threads of what, when woven together, is a full understanding of contract law. To illustrate, the following paragraph attempts to explain the title of this Chapter by going backward as a way of explaining 'why' from onset to result. Thereafter, the main topics will be addressed in chronological order from the title, hopefully benefitting from a more contextual understanding of the reason.

Parties often reach agreement although they have not nailed down every single detail of their contractual arrangement (although one of the parties is always arguing otherwise, since the matter has been argued, and then decided in a published opinion the likes of which are found throughout this casebook). Logically, it is not always appropriate for courts to deny that a contract has been formed. (3) More flexibility to recognize the parties' intent to form a contract while leaving some details to be supplemented was needed. Further, a court should not deny enforcement on the basis of a lack of formation for the parties' failure to address relatively inconsequential details that the parties themselves often take for granted. (2) Article 2 of the U.C.C. and the states' adoption of same include a fair number of standardized practices for contractual terms that are often left open by the parties to a contract. These are "gap-fillers" whose existence allows courts to rely on such terms to fill in holes left by the parties – providing courts with more flexibility to hold together contractual arrangements by allowing some of the holes to be filled by implication. (1) One of the best examples of a general rule that may be implied in a contractual arrangement if not otherwise agreed is how to address the situation where there is a distinct offer, followed by a distinct acceptance that contains a new, or *additional*, term. FLA. STAT. § 672.207(1)-(3) (2017) contains Florida's adoption of the U.C.C. Article 2's § 2-207 "Battle of the Forms" provision word-for-word. Stated another way, courts often faced situations where flexibility in contractual requirements was needed, scholars and experts (including the courts, of course) have collected some of the more popular, common practices that should be applied, and one of the best examples is what to do with additional terms in a "Battle of the Forms" situation.

672.207 Additional terms in acceptance or confirmation.—

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;
(b) They materially alter it; or
(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

Problem 4-2

Identify the sections or subsections of the "Battle of the Forms" where the concepts are located.

6. Which provision deals with the situation where the parties have not truly agreed on a binding contract, but have begun performances such that it would be better for a court to cobble together a contract from the writings, facts and circumstances that are established, supplemented perhaps by other "gap-fillers"?
7. Which provision frames the kind of situation for which this set of implied rules arises?
8. Which provision addresses *different* or *conflicting* terms rather than additional terms? (Be careful! This is a trick question.)
9. Which provision addresses additional terms where both parties to a contract are merchants? Are there any exceptions? If so, how many?
10. Which provision addresses additional terms where at least one of the parties to a contract is a non-merchant?

CMM Approach: readers are warned not to think that the U.C.C. Article 2 or state adoption of § 2-207 or the other U.C.C. Article 2 "gap-fillers" are the only terms that may be implied by the courts. Terms and practices may also be implied in a contractual arrangement based on, for example, what the parties have done pursuant to current contractual dealings, or what they have done in the past for similar transactions, or what the industry tends to do, if the parties would have been aware of such practices. *See, e.g.*, FLA. STAT. § 671.205 (2017) and especially its subsection (4). *See also*, U.C.C. § 1-103.

1. Battle of the Forms

PAUL GOTTLIEB & CO., INC. v. ALPS SOUTH CORP.

District Court of Appeal of Florida, Second District, 2007

985 So. 2d 1

CASANUEVA, Judge.

Paul Gottlieb & Co., Inc. (Gottlieb) appeals a final judgment awarding damages to Alps South Corp. (Alps) on its claim for breach of warranty. Gottlieb contends that the trial court erred by awarding consequential damages because the contract between the parties included a limitation of liability clause or, alternatively, because consequential damages were inappropriate in this case and were not sufficiently established by competent proof. We agree with Gottlieb in part and therefore reverse and remand with directions to the trial court. We conclude that the trial court erred in its analysis that the limitation of liability clause materially altered the contract. However, we also conclude Gottlieb's undisputed breach of contract entitles Alps to seek certain benefit-of-the-bargain damages that flow directly and incidentally from Gottlieb's breach under provisions of the Florida Uniform Commercial Code (U.C.C.). Accordingly, we remand the case to the circuit court to hold a new hearing on the limited question of the amount of damages only.

1. FACTUAL BACKGROUND

Gottlieb is a fabric converter based in New York City. Gottlieb supplies its customers specialty knitted fabrics that are shipped directly from third-party knitting and finishing mills. Alps is a manufacturer of medical devices located in St. Petersburg, Florida. Alps produces various types of liners that amputees use to attach prosthetic devices. In January 2000, Alps used liners that consisted of a specially designed gel material covered in spandex fabric that

stretched to allow the liner to be placed over the appendage and then compressed to provide stability.

Alps began testing a number of new fabrics in February 2000 hoping to develop a new product possessed of enhanced durability and stability. Gottlieb was a source of the new fabrics. After some initial testing, Alps settled on a specialty fabric provided by Gottlieb identified as TL2646 Coolmax [footnote omitted] fabric which outperformed the other fabrics. Alps began incorporating the new fabric into its liners. Alps received positive feedback from its customers that the new liners had increased comfort. The commercial relationship between Alps and Gottlieb started out in a promising fashion.

Unfortunately, six months later, in August 2000, the relationship began showing signs of a downturn. Alps rejected some fabric samples Gottlieb submitted because of unacceptable inconsistencies in both color and texture. On August 29, 2000, Alps sent a letter promptly notifying Gottlieb of the product deficiencies and stating that any future commercial relationship mandated that Gottlieb provide a more consistent product. However, the letter did not inform Gottlieb of the possibility that Alps could incur substantial additional costs as a result of using a different fabric. Also Alps did not disclose the specialized use of the fabric to Gottlieb. [Footnote omitted]. Gottlieb agreed to rework the fabric before delivering it to Alps.

Later events resulted in a worsening of the situation. Gottlieb exhausted its supply of the yarn used to produce the specialized high-tech fabric. It substituted a similar, but not identical, yarn without notifying Alps of the substitution. [Footnote omitted]. The trial court found this substitution caused a defect that was not easily discoverable by Alps. The new fabric did not stretch nearly as well as the original fabric that had been designated, tested, and approved by Alps. In early December of that same year, Alps began receiving complaints from customers that the fabric in the liners was less comfortable. The problems were so severe that Alps recalled the liners it had placed on the market and destroyed the devices in its inventory.

When Alps and Gottlieb discovered that the cause of the defective products was the undisclosed substitute yarn, the parties' business relationship further deteriorated. The business relationship ended when Gottlieb failed to receive payment for a submitted bill. Gottlieb then brought an action to collect damages due to the nonpayment. In turn, Alps counterclaimed for damages it asserted were caused by Gottlieb's breach of warranty. Of importance to the damage claim is the language set forth on the back of Gottlieb's finished goods contract which purports to limit its liability. The trial court ultimately considered this language to be an affirmative defense to the counterclaim.

Following a nonjury trial, the trial court awarded damages to Gottlieb on its claim totaling $28,846.29; awarded damages to Alps on its counterclaim of

$694,640.04; and determined that under Florida's U.C.C. provisions, the limitation of liability clause was a material alteration of the parties' contract. The trial court declined to enforce the provision concluding that by operation of law, it was not a part of the contract.

2. LIMITATION OF LIABILITY CLAUSE

This dispute arises from the common, but risky, commercial practice where the seller and buyer negotiate a contract involving goods by exchanging each others' standardized forms. The transactions of this type involved here are governed by section 2–207 of the U.C.C., codified in section 672.207, Florida Statutes (2000).

Here, Gottlieb first contends that the trial court erred by failing to enforce the limitation of liabilities clause found on the back of its finished goods contract. The clause in contention reads:

BUYER SHALL NOT IN ANY EVENT BE ENTITLED TO, AND SELLER SHALL NOT BE LIABLE FOR INDIRECT OR CONSEQUENTIAL DAMAGES OF ANY NATURE, INCLUDING, WITHOUT BEING LIMITED TO, LOSS OF PROFIT, PROMOTIONAL OR MANUFACTURING EXPENSES, INJURY TO REPUTATION OR LOSS OF CUSTOMER.

In its analysis, the trial court determined the clause constituted a material alteration under section 672.207(2) and as such it did not become part of the contract. In reaching this conclusion, the trial court determined that were it given effect, the limitation of liability "would allow Gottlieb to substitute a product without notice to Alps that would affect the final marketability of the final product." We do not apply the same reasoning as the trial court. The fact that Gottlieb altered a yarn type that resulted in a breach of contract is separate and distinct from the legal analysis of how the language of the contract is construed. In other words, the cause of the breach, the substituted yarn, is a question of fact which the parties did not dispute. Therefore, the trial court only needed to determine whether the clause, as a matter of law, materially altered the contract. Since this is a pure question of law, we review the trial court's conclusion de novo. *Am. Strategic Ins. Co. v. Lucas–Solomon,* 927 So.2d 184 (Fla. 2d DCA 2006).

17. Preservation

Before reaching the merits of this issue, we first determine whether it has been properly preserved for appeal. Alps correctly contends that Gottlieb failed to raise the limitation of liability clause as an affirmative defense in its response to the second amended complaint, although it had done so previously. Therefore, Alps asserts the issue has been waived and is not preserved for our review.

We agree with Alps that affirmative defenses must be pleaded either in the answer or as separate affirmative defenses and, if not pleaded, the issue is deemed waived. *See* Fla. R. Civ. P. 1.140(h)(1). There is, however, an exception to this general rule. It is well recognized that an affirmative defense can be tried by consent. *See Smith v. Mogelvang,* 432 So.2d 119, 122 (Fla. 2d DCA 1983); *Book v. City of Winter Park,* 718 So.2d 945, 947 (Fla. 5th DCA 1998); *Narus v. Narus,* 382 So.2d 144, 146 (Fla. 4th DCA 1980). An issue tried by consent is treated as though it had been raised in the pleadings. Fla. R. Civ. P. 1.190(b). Therefore, we must determine whether this issue was preserved because it was tried by consent of the parties.

"An issue is tried by consent when there is no objection to the introduction of evidence on that issue unless the evidence is relevant to other, properly pled issues." *Book,* 718 So.2d at 947 (internal citations omitted). In the instant case, the parties raised the issue in trial briefs, introduced evidence relating to the issue during trial, and argued its merits during closing argument. At no point did Alps object to the introduction of this issue as being beyond the scope of the original pleadings. Additionally, the trial court determined the issue was before it and ruled on its merits. For these reasons we determine the issue was tried by consent, preserved, and is properly before us on review.

B. The Battle of the Forms

We next determine whether the trial court erred by failing to enforce the limitation of liability clause. For the following reasons, we conclude the trial court erred.

"[T]he rules of engagement for the 'battle of the forms' are set out in the Uniform Commercial Code ('U.C.C.'), s. 2–207." *Bayway Ref. Co. v. Oxygenated Mktg. & Trading,* 215 F.3d 219, 223 (2d Cir.2000).

The same rules of engagement apply in Florida and are codified in section 672.207. Subsections (1) and (2) of the statute are intended, according to the Florida Code Comments provided with the 1965 Enactment, to end the battle by eliminating the uncertainty that often results from the exchange of conflicting purchase order forms and acknowledgement and acceptance forms. The battle lines are frequently created where, as here, "the seller's form contains terms different from or additional to those set forth in the buyer's form." Official Comment 1 § 672.207. Despite the differences in the forms, the parties proceed with the commercial transactions and fight the battle after the transaction concludes.

Initially, section 672.207(1) provides that, between merchants, where a "definite and seasonable expression of acceptance or a written confirmation is sent within a reasonable time," it operates as "an acceptance even though it

states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."

Having determined when or how the offer is deemed accepted, the statute next seeks to determine whether the additional term or terms are treated as a part of a legally enforceable contract. Subsection 672.207(2) provides:

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract *unless:*

> (a) The offer expressly limits acceptance to the terms of the offer;
> (b) They materially alter it; or
> (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
> (Emphasis provided.)

These statutory provisions allow the formation of a contract where an acceptance contains additional or different terms than the original offer. While such an acceptance ordinarily would not meet the strict requirements of the common law mirror image rule, the U.C.C. provides a more flexible approach.

Under section 672.207(2), additional terms included in an acceptance are construed as proposals for addition to the contract. *See A & M Eng'g Plastics, Inc. v. Energy Saving Tech. Co.,* 455 So.2d 1124 (Fla. 4th DCA 1984). Between merchants, the terms become part of the contract unless they fall into an exception. § 672.207(2). Within the context of section 672.207(2), the parties do not dispute that they are merchants, that Gottlieb's offer did not expressly limit acceptance to its terms, and that Alps did not object to the additional terms within a reasonable amount of time. The remaining issue is whether the limitation of damages clause, as an additional term, materially altered the contract. If the additional term materially alters the contract, it is excluded.

Procedurally, in determining whether a term constitutes a material alteration, other courts have placed the burden of proof upon the party seeking the term's exclusion. *See Bayway,* 215 F.3d at 223–24; *JOM, Inc. v. Adell Plastics, Inc.,* 193 F.3d 47 (1st Cir.1999); *Avedon Eng'g, Inc. v. Seatex,* 126 F.3d 1279 (10th Cir.1997); *Comark Merch., Inc. v. Highland Group, Inc.,* 932 F.2d 1196 (7th Cir.1991); *but see Westech Eng'g, Inc. v. Clearwater Constructors, Inc.,* 835 S.W.2d 190 (Tex.App.1992). We conclude that this rule is appropriate and hold that a party seeking the exclusion of a contractual term or provision pursuant to section 672.207(2), as constituting a material alteration, has the burden of proof. In doing so, we align this court with the great majority of this nation's courts. *Cf. Courington v. Courington,* 120 So.2d 64 (Fla. 2d DCA 1960) (holding that a party seeking to set aside a bill of sale on grounds of fraud and undue influence has the burden of proof).

C. Surprise or Hardship

Having determined which party appropriately bears the burden of proof, we next address the nature of proof that a party must offer to meet its burden. Unfortunately, the law in this area is not yet clearly developed. For example, Official Comment 4 to U.C.C. § 2–207 offers examples of "typical clauses which would normally 'materially alter' the contract" and that would "result in surprise or hardship if incorporated without express awareness by the other party." For other examples, see *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.,*401 F.3d 901 (8th Cir.2005); *Coastal Indus., Inc. v. Automatic Steam Prod. Corp.,* 654 F.2d 375 (5th Cir.1981); *Dale R. Horning Co. v. Falconer Glass Indus., Inc.,* 730 F.Supp. 962 (S.D.Ind.1990).

In contrast, Official Comment 5 to U.C.C. § 2–207 offers "[e]xamples of clauses which involve no element of *unreasonable surprise* and which therefore are to be incorporated in the contract unless notice of objection is seasonably given." (Emphasis added.) Relying on this language and common law principles, some courts have removed hardship from the analysis and look solely for surprise. *See Union Carbide Corp. v. Oscar Mayer Foods Corp.,* 947 F.2d 1333 (7th Cir.1991); *Suzy Phillips Originals, Inc. v. Coville, Inc.,* 939 F.Supp. 1012 (E.D.N.Y.1996). Previously, this court considered whether a term was a material alteration under section 672.207 in *Advanced Mobilehome Systems of Tampa, Inc. v. Alumax Fabricated Products, Inc.,* 666 So.2d 166 (Fla. 2d DCA 1995), and approved of the rationale of *Union Carbide* to reach its decision (observing that a change is material if agreement to it cannot be presumed). There, Judge Posner explained:

What is expectable, hence unsurprising, is okay; what is unexpected, hence surprising, is not. Not infrequently the test is said to be "surprise or hardship," but this appears to be a misreading of Official Comment 4 to UCC § 2–207. The comment offers examples of "typical clauses which would normally 'materially alter' the contract *and so result in surprise or hardship* if incorporated without express awareness by the other party" (emphasis added). Hardship is a consequence, not a criterion. (Surprise can be either.) You cannot walk away from a contract that you can fairly be deemed to have agreed to, merely because performance turns out to be a hardship for you, unless you can squeeze yourself into the impossibility defense or some related doctrine of excuse. *Union Carbide,* 947 F.2d at 1336 (citations omitted). Today, we continue to follow this rationale.

Turning first to the surprise prong, Alps must prove "that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term." *See Bayway Refining,* 215 F.3d at 224. The finished goods contract at issue was the sixth in a series between the two parties and each contract included the limitation of liability term. Each

proposed contract contained the terms which were visible on its face. The sole evidence presented at trial to establish surprise was that Alps had not read the contract before the dispute arose. Florida law has never excused a party from a contract simply because it failed to read the contract terms. *See Allied Van Lines, Inc. v. Bratton,* 351 So.2d 344 (Fla.1977); *Kinko's, Inc. v. Payne,* 901 So.2d 354 (Fla. 2d DCA 2005). Additionally, Official Comment 5 to UCC § 2–207 includes clauses which limit remedies in a reasonable manner among the examples of terms which do not involve unreasonable surprise. The record in this case does not allow a conclusion that Gottlieb's limitation of liability clause was an unreasonable surprise to Alps.

The record is similarly lacking with respect to hardship as a result of surprise. Courts that consider hardship look to whether the term would "impose substantial economic hardship on the non-assenting party." *Horning,* 730 F.Supp. at 962 (quoting *Trans–Aire Int'l, Inc. v. N. Adhesive Co., Inc.,* 882 F.2d 1254 (7th Cir.1989).) The *Horning* court reviewed a clause that provided "the buyer's exclusive and sole remedy for defective goods shall be to secure replacement." *Id.* at 963. In that case, the supplier was aware that the buyer could incur substantial liability if a breach occurred. *Id.* at 967. Further, the supplier's actions, in offering to work with the buyer, caused the buyer to believe that its costs would be reimbursed because of the breach. *Id.* at 963–64. The *Horning* court concluded that "[i]n this situation, where [the supplier] knew or had reason to know that [the buyer] could incur substantial liability for delays in finishing its subcontract, there can be no doubt that a limitation of consequential damages would work a hardship on the buyer." *Id.* at 963.

Here, the facts do not permit a result identical to that of *Horning.* Gottlieb never represented that, in the event of a breach, it would reimburse Alps for any or all consequential damages it sustained resulting from the breach. Instead, the evidence showed that Alps previously had returned a sample of nonconforming fabric to Gottlieb with a letter insisting on conforming goods. This letter did not mention or make claim for additional costs or damages resulting from Gottlieb's prior breach of performance. The evidence shows that Alps never informed Gottlieb of any consequences other than discontinuing their relationship. Alps did not inform Gottlieb of the specific manner in which the subject fabric would be used or what product would be crafted. Thus, Gottlieb could not foresee the *greater extent* of its potential liability, should a subsequent breach occur. Because Alps neglected to inform Gottlieb of the larger consequences of the breach, we conclude that Alps cannot maintain that incorporating the limitation of liability clause would result in a severe economic hardship. Thus, Alps failed to carry the burden of proof on hardship.

For these reasons, we conclude that the trial court erred by not enforcing the limitation of consequential damages clause. The award of consequential damages must be stricken. [Footnote omitted].

Finally, we note that enforcing of the clause at issue only bars consequential damages. [Footnote omitted]. The limitation in this clause does not exclude other damages available under the law. *See* § 672.719; *Council Bros., Inc. v. Ray Burner Co.,* 473 F.2d 400 (5th Cir.1973)(interpreting Florida law). We observe that section 671.106(1), Florida Statutes (2000), suggests that an injured party should not be worse off because the other party breached:
The remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good as a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

Thus, Alps is still able to recover some of its direct and incidental damages, although it is precluded from receiving consequential damages. *See* § 672.714–.715. Comment (a) of the Restatement of Contracts (Second) section 347 echoes this sentiment in that expectation damages are intended to give the injured party "the benefit of his bargain by putting him in as good as a position as he would have been had the contract been performed." The code also provides for incidental damages arising from the breach. These "include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." § 672.715(1). Therefore, the trial court may award Alps its direct and incidental damages. *See Adam Metal Supply, Inc. v. Electrodex, Inc.,* 386 So.2d 1316 (Fla. 2d DCA 1980) (holding a buyer's expenses incurred before discovering a defect are recoverable as incidental damages).

[The court went on to discuss whether Alps had proven lost profits with reasonable certainty. It stated that there were no specific findings or a lost production or lost profits, and hence, the evidence presented only yielded a speculation, which was insufficient to justify an award of lost profits.]

4. INSTRUCTIONS ON REMAND

Although we find that Alps did not prove lost profits with reasonable certainty, we do recognize that Alps' damages under the UCC came into existence at the moment Gottlieb delivered the fabric containing the unapproved yarn. This deficiency was neither obvious nor discoverable until after Alps had incorporated the fabric into its product line investing time, labor, and materials in the finished products. As a merchant, Gottlieb is expected to know that direct and incidental damages could flow from a delivery of unapproved goods. Due to the limitation of liability clause, Gottlieb properly insulated itself from consequential damages, but it cannot shield itself from the direct and incidental damages naturally arising from the undisputed

breach. We note again that the contract between the parties dealt only with supplying a specific and highly technical fabric made of a particular yarn combination. Gottlieb should have consulted with Alps prior to making a change in the yarn. However, Gottlieb did not notify Alps that it substituted an unapproved yarn for the earlier specified yarn. A clear nexus between the breach by Gottlieb and the injury to Alps exists. Accordingly, we leave open the possibility of more specific findings by the trial court as it revisits the issue of damages, including Gottlieb's familiarity with Alps' product requirements, the common trade practices and course of dealings in the fabric industry, the nature of Alps' inventory and its cost to recover the defective items, and any other indicia of Alps' loss or Alps' ability to mitigate such loss that the trial court may find helpful.

5. CONCLUSION

We hold that the trial court erred in awarding Alps consequential damages. We reverse and remand with instructions to strike the consequential damages and lost profits awards and order the circuit court to hold a hearing on the limited question of damages only. As outlined above, these damages include incidental and certain benefit-of-the-bargain (direct) damages stemming from Gottlieb's undisputed breach.

Reversed and remanded with instructions.

Notes

5. Readers may have realized that the most important section of the preceding case, provided in full less several of its footnotes, is found in its Section 2.B. This is the specific portion of the opinion relating to the Battle of the Forms issue. However, other sections of the opinion include reasoning that lawyers must by some point understand. One of the difficulties that students of contract law sometimes experience is being flooded with too much information and therefore getting lost in the details. However, attempts to understand by looking up unfamiliar terms or by studying some of the civil procedure and law practice aspects found in an opinion are exactly that mechanism which leads to having everything finally “click,” as law professors are wont to explain. Readers are encouraged to try to wrap their minds around topics such as “issue preservation” (2.A., for appellate practice), and “surprise or hardship” (2.C., for policy behind contract law, and the trial practice involving burden of proof). Even the paragraph with instructions on remand (IV) will prove to be important to know although at this point it may only draw away from what is most important for purposes of mastering this Chapter. All of these are subordinate to the Battle of the Forms issue, but mastery of them all is necessary for a full understanding of contract

law. When all of these concepts have been integrated into one's understanding, they will have "clicked."

6. The *Paul Gottlieb & Co.* case involves an additional term in the form of a limitation on consequential damages, which are explained in Chapter 9. What if for example Company ordered component parts needed to fulfill a contract from Supplier, and due to defects caused Company to lose a very lucrative contract with ConsumerCo? Would not Company want Supplier to pay it for the profit lost on the contract with ConsumerCo? In addition potentially to other damages? Would it be pleased to find that Supplier had tried to add a disclaimer of this kind of "lost profits" damages in its acceptance? If so, then this could very well prove to be a material alteration.

7. How does this topic fit with common law acceptance, especially the topics included in Chapter II? This is a uniquely U.C.C. advocation of the responsive test.

DEPENDABLE COMPONENT SUPPLY, INC. v. PACE ELECTRONICS INC.

District Court of Appeal of Florida, Fourth District, 2000

772 So. 2d 582

FARMER, J.

As long as there are merchant buyers and sellers of goods, there will be forms with self-serving boilerplate. And as long as the transactions proceed without incident—which may be after a long while and many sales—their forms will pass like ships on a foggy sea. But when at last one of their transactions sinks, each retreats to the shelter of its favorable terms to claim victory. Faced with such varying language in seller's and buyer's forms in this ill-fated sale, the trial judge found exclusive venue in Orange County. We reverse.

Buyer and seller already had numerous sales between them, each ignoring the other's contrary version, when the subject sale occurred in November 1999. Buyer's purchase order form stated as always that:

> "All goods are subject to our inspection and approval and can be canceled or returned at any time. If shipment will be delayed for any reason, advise us immediately, stating all the necessary facts. *To avoid errors, note specifications carefully and if unable to complete orders as written, notify us promptly.*" [e.s.]

Seller's invoice had a full page of additional terms as always on the reverse side, one stating that:

> "Both parties agree that any and all proceedings relating to the sale of the products to Buyer or these Terms and Conditions ... *shall be brought in the state courts of general jurisdiction in Orange County in the State of Florida,* which ... shall have exclusive jurisdiction for such purpose, and Buyer hereby irrevocably consents to such jurisdiction ...." [e.s.]

Upon receipt of buyer's purchase order, seller shipped the goods by carrier and sent its invoice containing the above additional terms. Buyer remitted payment in full promptly upon receipt of this invoice.

After later inspection of the goods, however, buyer this time rejected them as nonconforming and unacceptable and sued to recover the price and other damages. The action was filed in Broward County, where buyer had always maintained its business and where it had always received goods from the seller. In seller's answer to the lawsuit, it included a defense that venue in Broward was improper, and joined a counterclaim for the price on a subsequent sale (as to which buyer says it has refused payment for the same reasons). Seller also filed two affidavits by its corporate officers to the effect that buyer and seller had numerous previous transactions and that buyer had always acquiesced in its form invoices without objection.

At a hearing without any additional evidence, the trial judge concluded that seller's form invoice materially varied buyer's form purchase order but that buyer had failed to object to it. The failure to object to its seller's invoice, said the trial judge, meant that the provision had become part of the contract of sale between the parties. Seller's venue provision was thus enforceable. He transferred the action to Orange County. Buyer now appeals, armed with its form which says nothing about venue in Orange County. Judging by the thrust and parry with which the parties engage their respective forms, Orange County might as well be on the Davy Jones' Locker side of the International Date Line, instead of just up the road a bit from this district.

Nevertheless the law's the law, as they say, and so we turn to the UCC to see who wins this initial skirmish. Section 672.207(1) provides that:

> "A definite and seasonable ... written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."

Seller's invoice plainly operates as an acceptance. Although it does recite that it is conditional on buyer's assent to its additional terms, seller did not await buyer's assent to the additional terms before tendering performance. In short seller had already shipped the goods when it sent the invoice. In fact both sides performed their contract of sale without awaiting any other manifestation of assent by the opposing party to the forms each used.

The issue then revolves around the effect of the terms on the reverse side of the invoice. Section 672.207(2) seems to supply an answer, saying:

> "The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) The offer expressly limits acceptance to the terms of the offer; (b) They materially alter it; or (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

Here, each form conditioned its position on the other party's assent to its printed terms, a condition to which neither party seems to have manifested assent—certainly not in writing. Buyer's purchase order stated its terms, and seller's additionally stated terms materially varied the purchase order's terms. An exclusive venue provision outside one's home area seems both material, as well as a variance, especially where, as here, the provision would send buyer up to seller's court in a suit to recover the price already paid for nonconforming goods. [Footnote omitted.]

The only thing the written forms agree upon is the nature and amount of goods sold, the price and terms of delivery. Section 672.207(3) holds:

> "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code."

In other words, we enforce the terms that are not in conflict if we can meaningfully do so. *See Eastern Cement v. Halliburton Co.,* 600 So.2d 469 (Fla. 4th DCA 1992) (conflicting terms on opposing forms cancel each other and contract proceeds under nonconflicting terms). Again, the only thing they do not conflict on is the goods, price and delivery. That should suffice with many contracts for the sale of goods, and it is good enough here.

The trial court's decision comes down to its legal conclusion (which we review de novo) that buyer's failure to object to this same venue provision in prior

sales transactions operates as an implied acquiescence of it for this one. We might be inclined to agree if only the first transaction had involved buyer's purchase order form, with all later sales proceeding only on seller's invoices. Here, however, buyer used the same purchase order for every one of the "numerous" succeeding sales transactions, thereby evincing each time a renewed unwillingness to become bound in the current sale by any previous unilateral writings routinely sent by the seller with its shipment of goods. As long as buyer insisted on using the same purchase order without a venue provision (thus proposing to rely on any venue fixed by statute), seller's conflicting designation of its home turf can only be legally understood as a material variance in every transaction.

REVERSED.

POLEN, J., concurs.

HAZOURI, J., concurs in result only.[8]

Notes

(8) Casebook authors rarely ever include two or more cases to make a single point. When authors include a second case on the same issue or set of issues, it is done to supplement the understanding of that issue or issues. Perhaps the case shows a different result that is based on the same law but a materially different set of facts. Sometimes a case is particularly clear or lays out the law in an instructive, hierarchical or chronological way that merits attention (e.g., to help with outlining the "black letter law"). Additionally, authors may want to demonstrate a split of authority between states – often to show what the law used to be (and still may be, in a few jurisdictions), in contrast to what the law is or should be (in jurisdictions that are more progressive). Readers may glean that progression is one of the primary purposes of the U.C.C. Article 2, and even the Restatements on Contracts. These advocate what the authors and contributors feel is best-practices law.

Both cases reproduced in this Chapter involve merchants, but the *Dependable Component Supply, Inc.* case demonstrates the application of FLA. STAT. § 672.207(2)(a) (2017) – highlighting the purpose of what is often called a "proviso" clause. Such clauses make clear that there is an intent to reject *anything* different in a reply

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document. Further, at least to the mind of two of the appellate judges, the fact that the parties continued to perform without one party requiring, at the right times, its proposed additional term could be supported under subsection (3) of the "Battle of the Forms" provision – the determination of what binds the parties in the case of an additional term, if a contract in fact was not properly formed, depends on the parties' conduct.

(9) Readers may ask why a ruling such as the one in *Dependable Component Supply, Inc*. is justified on more than one basis. If a case is properly decided based on subsection (2) of FLA. STAT. § 672.207 (2017), why then also support a ruling based on subjection (3)? Parties may argue in the alternative by asserting more than one basis for their case, and sometimes courts are then inclined to rule on each alternative – especially to ensure finality and no further basis for or reason to appeal to the next higher court. (In fact, the concurrence in judgment only for the *Dependable Component Supply, Inc*. case might have been because the judge felt that only one basis for the ruling was proper and necessary, such that further published discussion might lead to future problems).

(10) In some cases, a term in the purported is not "additional," but is actually contradictory. A fair smattering of jurisdictions have adopted the "knock out" rule, which may save the acceptance although it contains some contradictory terms by throwing them out and filling them with "gap-fillers." For a case listing jurisdictions following this rule, *see Flender Corp. v. Tippins, Inter., Inc.*, 830 A.2d 1279, 1285-86 (Sup. Ct. PA 2003). Research has not uncovered any Florida case utilizing the "knock out" rule. Assuming that Florida has not adopted this rule, and that a purported acceptance contains a materially different, required term, what result?

Problem 4-3

Molly, a fitness instructor, sent Treadmills-R-Us a letter offering to purchase four of their name-brand treadmills for the gym she is about to open at a price of $1,000 each, delivery at least two days before the end of the month (in three weeks). She sent this letter on September 7. Treadmills-R-Us sent Molly back a letter, which stated, "We accept your offer to purchase four name-brand treadmills at $1,000 each. Delivery to your loading area October 2 by

Big-Box Delivery Company." May Treadmills-R-Us properly deliver on October 2?

Problem 4-4

Aaron owns a dealership that sells high-end motorcycles and motorcycle accessories. Aaron sends Builtwell, Inc. a letter, which stated, "I offer to purchase 50 Builtwell helmets at a price of $150 each." Builtwell, Inc. sent a letter back to Aaron three days later stating, "We accept your offer to purchase 50 fire-engine red Builtwell helmets at a price of $150 each." May Builtwell, Inc. properly ship 50 fire-engine red helmets to Aaron? Or can Aaron reject the shipment?

Problem 4-5

Brandy is in the business of selling beauty supplies. She contacts Beauty Supplies of America and places the following order: "I would like to place an order for 5000 tubes of MegaRed Lipstain at your wholesale price of $5 per tube." Beauty Supplies of America mailed the following letter to Brandy: "I accept your purchase order for 5000 tubes of MegaRed Lipstain at our wholesale price of $5 per tube. We will be adding $25 to cover shipping insurance." May Beauty Supplies of American enforce its right to the $25 shipping charge? Why or why not? Would it be different if the additional shipping charge was $250? $2,500?

Problem 4-6

Grant owns a business where he sells office supplies and furniture. On August 1, Grant writes a letter to Sammy, who owns a business across town that sells office supply products at wholesale costs to other businesses, which says the following: "I will purchase 100 packages of red ball-point pens for a price of $1 a package. They must be delivered to my business by October 1, no exceptions." On August 5, Sammy writes Grant a letter back which say the following: "I accept your offer to purchase 100 packages of red ball-point pens for a price of $1 a package. I can't get them to you by October 1, but I will have them delivered to your business by October 15." May Sammy properly ship the order by October 15? Why or why not?

Problem 4-7

Edwin industries faxed a purchase order for "1,000 widgets, same specifications as previous orders, delivery within 30 days from today." The price for widgets had remained stable for three years at $4.00/widget.

Dorchester Manufacturing received the faxed order and shipped the goods immediately with an invoice for $5,000 (or $5.00/widget). Has a contract been formed? Why or why not?

Note

Readers many have noticed that the call of the question changed between Problems 4-1 through 4-4 and Problem 4-5. The reason for this is that there is a difference between an additional term that changes something relatively minor on the one hand, and an addition or alteration of a major term of the contract. These are often called *dickered terms* because they are the kind that parties usually haggle over, such as price, quantity to be supplied at a given price, etc. An additional term of a smaller scale would not prevent the parties from forming the intent to contract – though there may be a question whether such additional term is or is not part of the agreement. Note that in such cases, the underlying contract has been saved. It is different when an additional term falls into the category of a major, or *dickered* term. Disagreement over a major term (or the situation where there are numerous open terms) would mean that the parties had not yet formed the requisite intent to a particular agreement, but that they were still in negotiations. Accordingly, an additional "big-ticket" term prevents formation. An additional "small-ticket" term would be put through FLA. STAT. § 672.207(2) (2017) analysis.

2. Gap Fillers

While state adoptions of U.C.C. Article 2 and case law generated thereunder are great examples of 'gap-filling,' the same mechanism is used in common law cases for things like services, employment, etc. By no means the *only* gap fillers, implied duties of good faith and fair dealing (requiring generalized reasonableness based on the surrounding facts and circumstances) are by far the most common, probably because they can be used for a variety of situations, from delivery terms to packaging requirements or payment terms. The second case in this subsection demonstrates a situation where gap-filling to sustain the existence of a binding agreement would go too far.

INSURANCE CONCEPTS AND DESIGN, INC. v. HEALTHPLAN SERVICES, INC.

District Court of Appeal of Florida, Fourth District, 2001

785 So. 2d 1232

PER CURIAM.

The issue presented in this appeal is whether a cause of action can be maintained for a breach of an implied covenant of good faith and fair dealing absent the allegation that the breaching party failed to perform an express provision of the contract. The trial court dismissed the complaint. We adopt the well-reasoned opinion of the trial court as our own, and reproduce it herein:

1. History of the Case

Plaintiff filed its original complaint on September 20, 1999. This complaint alleged a claim for breach of a duty of good faith and fair dealing against HealthPlan Services, Inc. (“HPS”). HPS filed a motion to dismiss the complaint. A hearing was held on December 3, 1999 on the motion to dismiss and this court entered an order on December 8, 1999 granting HPS's motion to dismiss with leave to amend.

Plaintiff served its first amended complaint on December 23, 1999. This amended complaint also alleged a breach of the duty of good faith and fair dealing against HPS. HPS filed a motion to dismiss the complaint asserting that the amended complaint still failed to state a cause of action and was not substantially different from the original complaint. A hearing was held on March 24, 2000 on the motion to dismiss and this court entered an order on April 5, 2000 granting HPS's motion to dismiss with leave to amend. On April 24, 2000 Plaintiff served its second amended complaint which contained one count for breach of contact [sic] and one count for breach of the duty of good faith and fair dealing. HPS again moved to dismiss and also moved for summary judgment on the breach of contract count. The issues were briefed by both parties and oral argument conducted on August 4, 2000.

2. Undisputed Allegations

For purposes of a motion to dismiss, the Court must accept any well-pled facts of the plaintiff's complaint as true. *Provence v. Palm Beach Taverns, I*nc., 676 So.2d 1022, 1024 (Fla. 4th DCA 1996). According to the allegations of the second amended complaint, HPS is in the business of providing health benefit services for healthcare payers and providers. In order to obtain such business, HPS contracts with Master Brokers who in turn recruit agents to sell HPS's services. If the agents are successful, HPS pays the agents a commission based on the volume of business. The Master Broker receives an “override” commission on that business.

Plaintiff Insurance Concepts and Design, Inc. (“ICD”) entered into a Master Broker's Contract (the “Contract”) with HPS. ICD recruited and trained insurance agents to solicit insurance customers for HPS. The Contract and the schedules, attached to the second amended complaint as Exhibit A, set forth the override fees to which ICD is entitled for the business written by its

assigned agents. The Contract contains the following provisions which provide that no override fees are due unless the premium is received by HPS:

> You [ICD] will be paid based on the amounts of premiums received in cash by Us [HPS] on policies issued from applications submitted by You and Your assigned Agents. Service fees will be paid on a "when received by Us" basis.
>
> Service Fees will be payable only on insurance maintained in force by payment of cash premiums, and no Service Fee is payable on premiums waived or commuted by reason of death, disability, or the exercise of policy options.
>
> Should We, for any reason, refund a premium on any policy ... You agree to repay upon demand any service fees received on such premiums or policies.

Contract, Section 2. Compensation and Section 1. Authority and Responsibility. At the hearing on the motion to dismiss, counsel for ICD stipulated that ICD is not owed any commission for premiums actually paid to HPS.

ICD alleges that HPS breached the Contract by:

> (a) failing to pay all legitimate claims made by insureds; (b) failing to pay legitimate claims in a timely manner; (c) failing to render accurate billings; (d) failing to make timely and accurate commission payment[s] to agents; and (e) failing to comply with applicable Florida law with respect to its obligations as a third party administrator.

Second Amended Complaint, ¶ 10. Essentially, ICD contends that HPS had an obligation to ensure that insureds did not cancel or fail to renew their insurance and that it breached that obligation by not properly servicing its customers, thus losing business for itself and commissions for ICD. ICD asserts claims for breach of an implied duty of good faith and fair dealing and breach of contract. Since counsel for ICD has stipulated that there is no claim for commissions on premiums actually collected and there are no allegations pointing to a specific term of the contract that was breached, the issue remaining for the court is whether a breach of the duty of good faith and fair dealing is alleged.

3. Applicable Law.

Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract. *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315

(11th Cir.1999)[, cert. denied, 528 U.S. 948, 120 S.Ct. 370, 145 L.Ed.2d 287 (1999)]; *Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1438 (S.D.Fla.1996); *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So.2d 1049, 1050 (Fla.1997); *Fernandez v. Vazquez*, 397 So.2d 1171, 1174 (Fla. 3d DCA 1981). This covenant is intended to protect "the reasonable expectations of the contracting parties in light of their express agreement." *Barnes*, 932 F.Supp. at 1438.

However, there are two restrictions on causes of action for the breach of good faith and fair dealing. First, the implied covenant of good faith should not be invoked to override the express terms of the agreement between the parties. *Weaver*, 169 F.3d at 1317–18; *Barnes*, 932 F.Supp. at 1438; *City of Riviera Beach v. John's Towing*, 691 So.2d 519, 521 (Fla. 4th DCA 1997). Second, a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached. *Weaver*, 169 F.3d at 1317–18; *Nautica Int'l, Inc. v. Intermarine USA, L.P.*, 5 F.Supp.2d 1333, 1340 (S.D.Fla.1998)(finding as a matter of law that plaintiff stated claim because it alleged an express breach of contract); *Anthony Distrib., Inc. v. Miller Brewing Co.*, 941 F.Supp. 1567, 1574 (M.D.Fla.1996); *Barnes*, 932 F.Supp. at 1438–39; [*Burger King Corp. 5.*] *Holder*, 844 F.Supp. [1528, 1530 (S.D.Fla.1993)]. A duty of good faith must relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements. *Hospital Corp. of America v. Florida Med. Ctr., Inc.*, 710 So.2d 573, 575 (Fla. 4th DCA 1998)(emphasis added). The duty of good faith does not attach until the Plaintiff can establish a term of the contract that HPS was obligated to perform. *Id.*; *see also Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1314 (11th Cir.1998) ("[G]ood faith requirement does not exist 'in the air'. Rather, it attaches only to the performance of a specific contractual obligation."). Allowing a claim for breach of the implied covenant of good faith and fair dealing "where no enforceable executory contractual obligation" remains would add an obligation to the contract that was not negotiated by the parties. *Hospital Corp.*, 710 So.2d at 575.

Florida courts have not addressed whether an agent may recover for lost commissions as a result of an insurer acting in bad faith to its customers. Courts in other jurisdictions that have addressed this issue have determined that an agent may not recover for damages in such a situation. *See Sterling Colorado Agency, Inc. v. Sterling Insurance Co.*, 266 F.2d 472, 474 (10th Cir.1959)(holding an agent is not a third party beneficiary under the insurance policy and the implied promise of good faith dealing on the agent's contract does not preclude the insurer from contracting with third parties according to its judgment of business interests; even if it acted in bad faith in regard to its policyholders, the company is answerable only to the policyholders); *accord*

Keith v. Alexander Underwriters Gen. Agency, Inc., 226 Ga.App. 838, 487 S.E.2d 673, 675 (1997)("If a policy was inappropriately canceled or mishandled, a claim against the insurer could be asserted only by the policyholders[.]"); *see also Iglesias v. Mutual Life Ins. Co. of New York*, 156 F.3d 237, 240 (1st Cir.1998)(Provision in agent's contract authorizing him to "solicit applications for insurance in MONY of the types of insurance which MONY is issuing" did not limit the company's ability to withdraw products from the agent's market; to find otherwise "would flip the employment relationship between MONY and its agents on its head[.]"); *Fidelity Ins. Agencies v. Citizens Cas. Co. of New York,* 194 F.2d 43, 47–48 (7th Cir.1952) (Insurance company's agreement to appoint agent to solicit business in a prescribed territory for five years was not of itself an agreement by the company to continue to do business within that territory for the entire term of the contract); *Winnick v. Alvin and Co., Inc.*, No. 3:95CV0415, 1998 WL 698498, (D.Conn. Mar.16, 1998)("A disappointment in earnings expectations is not a sufficient ground for finding a lack of good faith or unfair dealing[.]").

The Plaintiff points to *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092 (Fla. 1st DCA 1999)[,] for support of its position. This case is inapposite. In Cox, CSX had exclusive rights to the plaintiffs' trucking services. It also had contracts with other trucking companies. Under the terms of the agreement, CSX was not required to furnish any specific amount of freight or number of loads for transport at any particular time or to any particular place. The plaintiffs sued alleging that CSX's employee was exercising its discretion in allocating the loads to the various companies, in an arbitrary, fanciful and unreasonable manner. Although the appellate court found no breach of the express terms of the contract, it determined that issues of fact existed as to whether the manner in which CSX exercised its discretion violated the implied duty of good faith. I*d.* at 1098.

Unlike the case at bar, in Cox there was an express provision in the contract, the allocation of loads between Cox and other carriers, that was allegedly not performed in good faith. The plaintiff here can point to no such provision in the contract.

4. Conclusions.

Under the Contract, HPS is obligated to the Master Broker to pay an override commission based on successful sales of its assigned agents. The Contract does not obligate HPS to provide any particular level of service to the customers. There is no provision in the Contract that obligates HPS to continue to pay commissions to either the agents or the Master Broker if a customer cancels its agreement with HPS for any reason and HPS is no longer receiving income from the account. In fact, the Contract expressly provides that commissions will be payable only on insurance maintained in force by payment of cash premiums.

The Plaintiff's second amended complaint like the two prior complaints still fails to identify any specific provision of the Contract that was breached. The Plaintiff has continually asserted as a basis for its claim the breach of "implicit" terms of the contract. However, these "implicit" provisions have no basis in law or in fact and cannot support a cause of action for breach of contract or breach of the implied duty of good faith and fair dealing.

While the granting of motions to dismiss with prejudice is generally not favored, it is proper if the pleading cannot be amended to state a cause of action. *Gamma Dev. Corp. v. Steinberg*, 621 So.2d 718, 719 (Fla. 4th DCA 1993). After three attempts, the Plaintiff has demonstrated that it cannot amend its pleading to state a cause of action.

The decision of the trial court is affirmed.

WARNER, C.J., STEVENSON and HAZOURI, JJ., concur.

Notes

3. As discussed briefly in the Introduction, the binding nature of federal cases is absolute where a Florida court needs to consider and apply federal law.[9] A federal court exercising its diversity jurisdiction[10] is required to apply the state laws of Florida governing the controversy.[11] Therefore it is better to rely on state law cases rather than federal court pronouncements of what the state law entails. Nevertheless, federal courts may lay out the elements particularly well or clearly explain the law, and any exceptions thereto, with heightened clarity. A federal court opinion may even contrast state rules, providing a better understanding of how state laws may differ on a particular legal rule. As this casebook is on Florida case law, federal cases are sometimes excerpted in notes (like this one) or referred to in footnotes. The following excerpt carefully distinguishes the differences between subsections (2) (*additional terms*) & (3) (*no final written agreement, but conduct that, with the written parts, may be used to cobble together an agreement*). Problem 4-8 following the excerpt may help to clarify when to use subsection (3).

4. Though this is not always the case, a court might find that the parties are too far apart for a contract to have formed, some "gaps" in an agreement can be implied to save the contractual relationship. The Uniform Commercial Code (and state adoptions of it) set out some of the most common kinds of "gap-fillers," such as the U.C.C. §3-305 Open

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Price Term (FLA. STAT. § 672.305 (2017)) - where there is none a court could imply a "reasonable" one under the facts and circumstances. Others can be implied in law based on the parties' conduct relating to the purported agreement (*course of performance*), to their past dealings in similar contractual situations (*course of dealing*), and even the conduct of other parties in similar contractual situations (*usage of trade*), Better definitions are found in U.C.C. § 1-103 (FLA. STAT. § 671.103 (2017)), and these concepts will be revisited in Chapter 15. Further, a court may imply some things in law, such as the duty of good faith and fair dealing addressed in the *Insurance Concepts and Design, Inc.* case.

COASTAL & NATIVE PLANT SPECIALTIES, INC. v. ENGINEERED TEXTILED PRODUCTS, INC.

United States District Court, ND Florida, 2001

139 F. Supp. 2d 1326

ORDER DENYING SUMMARY JUDGMENT

COLLIER, District Judge.

THIS CAUSE comes before the Court on Third–Party Defendant OCCIDENTAL CHEMICAL CORPORATION's ("OxyChem") motion for summary judgment and documents in support thereof (docs. 144–47, 154). Defendant/Third–Party Plaintiff ENGINEERED TEXTILE PRODUCTS, INC. ("ETP") timely filed a memorandum and evidentiary materials in opposition (docs. 149–51). The Court has taken summary judgment under advisement (doc. 148) and is now prepared to rule on OxyChem's motion. For the reasons stated below, the motion for summary judgment is DENIED.

* * *

1. Contract Formation

This case involves a classic "battle of the forms" situation which can only be resolved by section 2–207 of the UCC. The drafters of the UCC designed this section to "allow parties to enforce their agreement ... despite discrepancies between a written offer and a written acceptance." 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1–3 n. 1 (4th ed.1995) [hereinafter WHITE & SUMMERS]. It states as follows:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or

agreed upon, *unless acceptance is expressly made conditional on assent to the additional or different terms.*

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act.

N.Y. U.C.C. LAW § 2–207 (emphasis added). [Footnote omitted] Thus, section 2-207 contemplates contract formation via three different routes. *See JOM, Inc. v. Adell Plastics, Inc.,* 193 F.3d 47, 53–54 (1st Cir.1999); *Diamond Fruit Growers, Inc. v. Krack Corp.,* 794 F.2d 1440, 1443–44 (9th Cir.1986); *Dorton v. Collins & Aikman Corp.,* 453 F.2d 1161, 1166 (6th Cir.1972); WHITE & SUMMERS § 1–3. Under subsection (1), the parties may form a contract by satisfying the language up to the comma. The parties can also form a contract by satisfying the language after the comma (also known as the "proviso"). Subsection (3) provides the third and final method of forming a contract. Therefore, before the Court can decide what terms govern ETP and OxyChem's agreements, the Court must determine the manner in which the parties formed their contracts.

In the case *sub judice,* OxyChem never accepted ETP's purchase orders. OxyChem's invoices made its acceptance "subject to and expressly conditioned" upon ETP's assent to the terms and conditions printed on the reverse side of the invoices. The invoices also expressly rejected ETP's terms. Thus, under the UCC, each invoice did not operate as an acceptance. *See id.* § 2–207(1) & cmt. 2. OxyChem's invoices were counteroffers. *See JOM,* 193 F.3d at 53; *Dorton,* 453 F.2d at 1166, 1168; WHITE & SUMMERS § 1–3. The record fails to show ETP assented to the additional terms. Consequently, the parties never formed legally binding contracts upon the exchange of their written documents. This conclusion remains true notwithstanding the language in OxyChem's invoices stating "Buyer shall be deemed to have assented to the provisions hereof in all respects by its acceptance of any goods shipped or by failure to give Seller written notice of objection within five business days of Buyer's receipt of this invoice." Once OxyChem made a counteroffer,

a contract could only be formed by ETP's express acceptance of the terms. *See JOM,* 193 F.3d at 53; *Diamond Fruit Growers,* 794 F.2d at 1443; *Leonard Pevar Co. v. Evans Prods. Co.,* 524 F.Supp. 546, 551 (D.Del.1981). ETP's acceptance of the goods or failure to object does not constitute "assent" within the meaning of section 2–207(1). *See Ionics, Inc. v. Elmwood Sensors, Inc.,* 110 F.3d 184, 189 (1st Cir.1997); *Diamond Fruit Growers,* 794 F.2d at 1444–45; *Dorton,* 453 F.2d at 1168 & n. 4; *cf.* N.Y. U.C.C. LAW § 2–207 cmt. 3 (stating if additional or different terms are such that might materially alter the original bargain, "they will not be included unless expressly agreed to by the other party"). A contrary result would undermine the purpose of section 2–207. "That is, the last form would always govern." *Ionics,* 110 F.3d at 189.

This does not mean, however, the parties failed to form a contract. OxyChem shipped the goods after receiving ETP's purchase orders. ETP accepted the goods and paid for them before any dispute arose. Without a doubt the parties acknowledged the existence of a contract every time they conducted business with each other. *See* N.Y. U.C.C. LAW § 2–207 cmt. 7. Therefore, section 2–207(3) governs and the terms of each contract "consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision" of the UCC. This conclusion begs the question: Can a party utilize section 2–207(2) to provide additional terms to a contract formed pursuant to section 2–207(3)? Stated differently, can OxyChem use subsection (2) to incorporate the terms printed on the reverse side of its invoice into the contracts formed with ETP? [Footnote omitted] For the reasons stated below, the Court answers this question in the negative.

2. Invoice Terms

In *C. Itoh & Co. v. Jordan Int'l Co.,* 552 F.2d 1228, 1236 (7th Cir.1977), the Seventh Circuit asked the following question: "What are the terms of a contract created by conduct under Section 2–207(3) rather than by an exchange of forms under Section 2–207(1)?" The appellate court explained:

The second sentence of Section 2–207(3) provides that where, as here, a contract has been consummated by the conduct of the parties, "the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act." ....

We have been unable to find any case authority shedding light on the question of what constitutes "supplementary terms" within the meaning of Section 2–207(3) and the Official Comments to Section 2–207 provide no guidance in this regard. We are persuaded, however, that the disputed additional terms (*i.e.,* those terms on which the writings of the parties do not agree) which are

necessarily excluded from a Subsection (3) contract by the language, “terms on which the writings of the parties agree,” cannot be brought back into the contract under the guise of “supplementary terms.” This conclusion has substantial support among the commentators who have addressed themselves to the issue. As two noted authorities on Article Two of the Code have stated:

It will usually happen that an offeree-seller who returns an acknowledgment form will also concurrently or shortly thereafter ship the goods. If the responsive document (sent by the seller) contains a printed assent clause, and the goods are shipped and accepted, Subsection (3) of Section 2–207 comes into play.... [T]he terms on which the exchanged communications do not agree drop out of the transaction, and reference to the Code is made to supply necessary terms.... Rather than choosing the terms of one party over those of the other ... it compels supplying missing terms by reference to the Code....Duesenberg & King, *supra,* § 3.06[4] at 73–74. Similarly, Professors White and Summers have concluded that “contract formation under subsection (3) gives neither party the relevant terms of his document, but fills out the contract with the standardized provisions of Article Two.” White & Summers, *supra,* at 29.
Accordingly, we find that the “supplementary terms” contemplated by Section 2–207(3) are limited to those supplied by the standardized “gap-filler” provisions of Article Two.....

We are convinced that this conclusion does not result in any unfair prejudice to a seller who elects to insert in his standard sales acknowledgement form the statement that acceptance is expressly conditional on buyer's assent to additional terms contained therein. Such a seller obtains a substantial benefit under Section 2–207(1) through the inclusion of an “expressly conditional” clause. If he decides after the exchange of forms that the particular transaction is not in his best interest, Subsection (1) permits him to walk away from the transaction without incurring any liability so long as the buyer has not in the interim expressly assented to the additional terms. Moreover, whether or not a seller will be disadvantaged under Subsection (3) as a consequence of inserting an “expressly conditional” clause in his standard form is within his control. If the seller in fact does not intend to close a particular deal unless the additional terms are assented to, he can protect himself by not delivering the goods until such assent is forthcoming. If the seller does intend to close a deal irrespective of whether or not the buyer assents to the additional terms, he can hardly complain when the contract formed under Subsection (3) as a result of the parties' conduct is held not to include those terms. Although a seller who employs such an “expressly conditional” clause in his acknowledgement form would undoubtedly appreciate the dual advantage of not being bound to a contract under Subsection (1) if he elects not to perform and of having his additional terms imposed on the buyer under Subsection (3) in the event that performance is in his best interest, we do not believe such a result is

contemplated by Section 2–207. Rather, while a seller may take advantage of an “expressly conditional” clause under Subsection (1) when he elects not to perform, he must accept the potential risk under Subsection (3) of not getting his additional terms when he elects to proceed with performance without first obtaining buyer's assent to those terms. Since the seller injected ambiguity into the transaction by inserting the “expressly conditional” clause in his form, he, and not the buyer, should bear the consequence of that ambiguity under Subsection (3).
Itoh, 552 F.2d at 1236–37 (footnotes and citations omitted) (second, third, fourth, fifth, and sixth alterations in original). Thus, the court held that “supplementary terms,” within the meaning of section 2–207(3), are limited to the standard gap-filler provisions of the UCC. [Footnote omitted]

In 1992, the Seventh Circuit expanded its holding in *Itoh* and determined that section 2–207(3)'s reference to “any other provision” encompasses those sections relating to course of performance (N.Y. U.C.C. LAW § 2–208) and course of dealing and usage of trade (N.Y. U.C.C. LAW § 1–205). *See Dresser Indus., Inc., Waukesha Engine Div. v. Gradall Co.,* 965 F.2d 1442, 1451–52 (7th Cir.1992); *see also Daitom, Inc. v. Pennwalt Corp.,* 741 F.2d 1569, 1579 (10th Cir.1984). New York law follows the sound logic articulated in *Itoh, Dresser,* and *Daitom. See Lorbrook Corp. v. G & T Indus., Inc.,* 162 A.D.2d 69, 562 N.Y.S.2d 978, 981 (N.Y.App.Div.1990) (explaining how section 2–207(3) rejects the common-law last-shot rule “by giving neither party the terms it attempted to impose unilaterally on the other”); *see also Wyandotte Indus. v. E.Y. Neill & Co. (In re First Hartford Corp.),* 63 B.R. 479, 489 (Bankr.S.D.N.Y.1986). Recently, the Supreme Judicial Court of Massachusetts declared:

[T]he criteria in subsection (2) determine what “additional or different terms” will or will not be part of a contract that is formed by the exchange of writings. Where the writings do not form a contract, subsection (3) states its own criteria—“those terms on which the writings agree” plus any terms that would be provided by other Code sections. One cannot turn to subsection (2) as another Code section that would supply a term when, by its express provisions, subsection (2) simply does not apply to the transaction. *Commerce & Indus. Ins. Co. v. Bayer Corp.,* 433 Mass. 388, 742 N.E.2d 567, 573–74 (2001); *cf. McCarty v. Verson Allsteel Press Co.,*89 Ill.App.3d 498, 44 Ill.Dec. 570, 411 N.E.2d 936, 945 (1980) (stating “[i]t is well established that under this provision terms contained only in one of the party's forms are not part of the contract”). *But see JOM,* 193 F.3d at 54 (stating “[t]he terms of their agreement would then be determined under the ‘default’ test in § 2–207(3), which implicitly incorporates the criteria prescribed in § 2–207(2)”).

Based on the foregoing authority, subsection (2) only becomes operative when a contract is formed under subsection (1).*See also, e.g., Dorton,* 453 F.2d at 1166. Therefore, the Court holds that a party cannot utilize section 2–

207(2) to provide additional terms once a contract is formed pursuant to section 2–207(3).

When a contract is formed pursuant to section 2–207(3), as here, the contract terms consist of the standard gap-filler provisions of the UCC as well as those sections relating to course of performance and course of dealing and usage of trade.

As stated in this Court's previous order denying ETP's motion for summary judgment, the record before the Court contains too many facts in dispute to resolve this matter on summary judgment. Because the Court has determined that the parties did not form a contract based on the exchange of their written documents, issues of fact as to the contract terms remain. A fact finder must decide what terms govern the parties' agreements by examining the parties' course of performance and course of dealing and usage of trade, and by applying the standard gap-filler provisions of the UCC. *See* N.Y. U.C.C. LAW §§ 1–205, 2–208, 2–301 to –319. Issues of fact also remain with regard to when ETP received OxyChem's invoices. If OxyChem's invoice arrived after the goods arrived, then section 2–207 does not control.

Case law suggests section 2–206(1)(b) forms the contract in accord with ETP's terms, as well as the standard UCC gap-filler provisions. *See, e.g., Wheaton Glass Co. v. Pharmex, Inc.,* 548 F.Supp. 1242, 1244–45 (D.N.J.1982); *G.W. White & Son, Inc. v. Gosier,* 219 A.D.2d 866, 632 N.Y.S.2d 910, 912 (1995) (noting that "a disclaimer or exclusion of warranties delivered to the buyer after consummation of the sale is not effective unless the parties have entered into a separate agreement pursuant to ... § 2–209"); *Niagara Real Estate, Inc. v. Wollstein,* 198 A.D.2d 913, 604 N.Y.S.2d 464, 464 (1993) (stating the "terms are not binding upon the purchaser because the invoice was not sent within a reasonable time within the meaning of UCC 2–207(1)" and citing *Wiencken v. Mill–Rite Sash Door Co. (In re Empire Pac. Indus., Inc.),* 71 B.R. 500 (Bankr.D.Or.1987)); [Footnote omitted] *cf. First Sec. Mortgage Co. v. Goldmark Plastics Compounds, Inc.,* 862 F.Supp. 918, 934 (E.D.N.Y.1994) (finding that a seller failed to prove the buyer "ever received or even saw the reverse side of the bills of lading or the relevant language in the invoices at issue" and concluding the buyer "could not be bound by such provisions"); WHITE & SUMMERS § 1–5 (stating "where the buyer sends a purchase order, the seller then ships the goods, and thereafter sends a form that arrives after the goods arrive, 2–207 does not control").

* * *

For the reasons stated above, OxyChem's motion for summary judgment is DENIED.

3. SUMMARY

The Court's ruling in this matter may be summarized as follows, and IT IS HEREBY ORDERED:

1. Third–Party Defendant OCCIDENTAL CHEMICAL CORPORATION's motion for summary judgment (doc. 144) is DENIED.

2. The issues are joined in this case and the discovery period has ended. The trial in this case will now be set. Toward this end, counsel are directed to confer personally and notify the Court in writing within five (5) working days of the expected length of the trial and confirm this case to be a trial by judge or jury. All parties will be notified by separate order of the dates for the pretrial conference, if necessary, and trial.

Note

Did you note that the opinion, near the end of its Section 2, addresses the distinction between questions of law and questions of fact? Does this track with what you learned in Chapter I?

Problem 4-8

MiniMotors, a Florida corporation, sent its standard purchase order to Cogs, Inc., a company formed under the laws of and operating in India. The purchase order specified the three kinds of cogs being purchased, the required date of receipt of the shipment, price range with the phrase “best price at market date of shipping,” and the standard array of *boilerplate* (small-print, numerous clauses pre-printed contracts) covering things like warranties, severance clause, etc. Missing were the quantities, attribution of the risk of loss during shipping, and choice of shipping company, among other things. Cogs, Inc. chose its favorite shipper and sent 1,000 each of the three types of cogs the next day, price of insurance added to the order and payable by MiniMotors, followed by an email confirmation stating the most basic details. Just before it received Cogs, Inc.’s email confirmation, MiniMotors sent specifications for the widgets, but again no set quantities or other information such as risk of loss, shipping charges, etc. (As it turns out, the shipped products actually met the required specifications). A week later, the shipment arrives in port very near MiniMotors. There is no other market for Cogs, Inc’s products in the U.S. and return shipping would be delayed due the hurricane season and would also be quite expensive. Is there enough in the written correspondences to establish the elements of a contract? If not, may a court use FLA. STAT. § 672.207(3) (2017) to cobble together, with the terms on which the parties agree and some “gap-fillers,” the rough outlines of a binding contract based on the parties’ conduct?

3. Flexibility

Not much space will be taken on this topic at this time, but those new to the study of contracts law are well advised to understand the competing interests of legal formalism (avoiding the rewriting or additions to a contract) and more flexible approaches that try to salvage contractual transactions and actually honor the parties' original intent (i.e., to have a binding deal, though not all aspects have been fully set out). Both theories are valid and currently in use in the state of Florida – they are not necessarily mutually exclusive and therefore continue to co-exist. In some cases, the state courts' view may be clear – toward a more flexible or liberal approach as directed by the State legislature in its adoption of U.C.C. Articles 1 and 2, for example. In other cases, courts may take a more careful approach to avoid rewriting a contract or imposing some duty on a party that would not have been voluntarily contemplated by that party and would probably require more proof to support its existence though it defies logic.

The dichotomy between legal formalism and liberalism evidences itself in a variety of areas. For example, the conclusion whether a purported offer contains sufficient terms (in Chapter I) may hinge on whether the court is legally formalistic or follows a more flexible approach. Whether a court will find that the commencement of performance in a unilateral contract situation creates an option contract to allow the performer to finish and therefore to collect (Chapter V) may hinge on a judge's views on legal formalism versus flexibility. Whether and to what degree a court will imply gap-fillers (Chapter IV) would be affected by the court's views on this ubiquitous dichotomy. As another, but not a final, example, how courts interpret interpretation clauses or ambiguous provisions in a contract (Chapters XIV and XV) will vary depending on which side the court is on. A very interesting example is in the area of third-party beneficiary law (Chapter XXI).

CMM Approach: This dichotomy affects a great deal of contract law and represents yet another factor to be mindful of in contracts cases. We recommend wrapping this concept into a chronological way of thinking – i.e., "the old way" versus "the new way." Then determine if one is in an "old way" jurisdiction or is in front of an "old way of thinking" judge and apply that rule, while at least mentioning the dichotomy. If one is not clear, the safest way to address this is to treat the "new way" as the general rule to be applied while mentioning what might be done in an "old way" jurisdiction – at least you cover all bases that way. MBE takers should presume a "new way" approach. Be careful not to have this issue dominate the discussion of substantive law unless the question specifically requires the exploration of the two philosophies and/or a chronological analysis.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 4

5. The notion of saving contractual relationships from small defects where the intent of the parties was to have agreement
6. Gap-fillers utilized to save these contractual relationships and the workings of the 'gap-filler' U.C.C. §§ 2-207(2) & (3)
7. The development of flexibility, moving away from legal formalism, in that contract law is in a state of flux
8. The concept of "boilerplate"

SUGGESTED EXERCISE(S)

9. Have the students locate another state's adoption of U.C.C. § 2-207 and determine whether it is an exact duplication or whether there are any changes. If so, what is the reason for the difference?

10. Have the students find a case from another jurisdiction that resolves the controversy using subsection (3) of that state's adoption of U.C.C. § 2-207(3). Does that case provide a good analysis of all three subsections?

Chapter 5: CONSIDERATION

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The third formation-of-contract element is consideration. This concept has been mentioned in past Chapters, but what is it, and more importantly, what is its significance? Historically, consideration may be traced back to early medieval English common law. However, it was not until 1876 when Lush J in *Currie v. Misa*,[12] authored this quote that became basis for the consideration requirement: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other . . ." As indicated in past Chapters, contracts formation needs an exchange. But what type of exchange is needed? As detailed in this Chapter, readers will find that it must be a promise with legal support; if not, the exchange will be nothing more than a *nudum pactum* (naked agreement).[13] If a purported contract falls into the category of a naked agreement, a court will find a lack of consideration, and hence that there was no valid formation of contract.

With that said, readers should first come to understand that the general concept of consideration today is very similar to the original definition stated in *Currie*. Valuable consideration for a promise is generally found when there is (1) a return promise that is bargained-for and given in exchange for the promise; (2) an act or forbearance; or (3) modification or destruction of a legal relationship. In this Chapter's first section, readers should pay close attention to when a court may or may not find there to be a bargained-for exchange between the parties. Similarly, readers should next take note of the language in *Dorman v. Publix-Saenger-Sparks Theaters, Inc.* This case opinion articulates how Florida chooses to follow the rule that valuable consideration may consist of either a benefit to a promisor, or a detriment to the promisee, or both. Finally, readers should understand and consider the idea of

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forbearance and how it may constitute sufficient consideration for the formation of contract.

Second, the concepts of sufficiency and adequacy are explored in depth. As emphasized later in this Chapter, readers must understand that these two words are not interchangeable. For now, readers should be aware that sufficiency refers to the idea that the law finds value in the purported consideration – i.e., existence. On the other hand, adequacy is a term that is applied to the value amount – i.e., quantification. Courts generally will not inquire into adequacy (quantification) whereas sufficiency is relatively clear.

Third, readers will be introduced to the idea of output and requirements contracts from U.C.C. Article 2 (sale of goods). These pose a potential lack-of-consideration issue which is deftly removed by these provisions and which underscores the logic and the genius of U.C.C. Article 2. Because this goes to the core of U.C.C. Article 2 as a 'commercial' supplement to the common law on contracts, readers who are also future test-takers should take the time to develop a basic understanding of how and when the rules on output and requirements contracts are applied.[14] Requirements contracts are ones in which a party agrees to supply as many goods or services required by the other party; in exchange, the other party promises that it will exclusively obtain said goods from the first party. On a similar note, output contracts exist where a party agrees to supply his or her entire production (or an articulated percentage) to the other party; in exchange, the second party agrees to purchase the first party's entire output (or an articulated percentage). At first glance, readers may question whether there is valid consideration in such agreements. By the end of this Chapter, readers should have a better understanding of why the law finds valid consideration. As a point of cross-reference, readers should keep the idea of output and requirements contracts in mind when the concept of illusory and alternative promises is raised in Chapter 6.

Finally, readers should take note that consideration may be express, for example when it has been specifically stated in a written contract or verbally stated in an oral contract, or it may be implied-in-fact, for example by the conduct of the parties. In other scenarios, consideration may even be implied by the terms of the contract. The concept of expressed and implied contracts will be explored in greater depth in Chapter 7.

1. Consideration Defined

Consideration is the third element of contract formation. Thinking of it another way, it also serves an evidentiary function. If someone intends to contract, rather than give a gift, bribe or other intent (which is governed by

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something other than *contract* law), s/he/it will turn over something in return for something else that is desired.

A. Bargained-For Exchange

SOLNES v. WALLIS & WALLIS, P.A.
United States District Court, S.D. Florida, 2014
15 F. Supp. 3d 1258

ROBIN S. ROSENBAUM, District Judge.

* * *

This matter arises from a failed yacht sale. Essentially, Plaintiff Stig Solnes ("Solnes") asserts that although he paid for a vessel, the seller did not deliver it. Defendant Wallis & Wallis, P.A. ("WWPA"), acted as the escrow agent for the sale. Solnes contends that WWPA accepted money on the seller's behalf and forwarded it to the seller, even though WWPA and Defendant Peter Wallis ("Wallis") knew that the boat in question had been sold to someone else and would never be delivered to Solnes. Solnes initially sued each Defendant for breach of contract and breach of implied contract regarding their escrow responsibilities. *See* ECF No. 1.

* * *

Solnes entered into a Vessel Purchase and Sale Agreement (the "Agreement") with Seller for the purchase of a 200162–foot Fairline Squadron known as the *M/Y Symphony.* ECF No. 19–1. Jack Thibaut and the Thibaut Companies (Thibaut International, Inc., and Unique Boats, Inc.) hired WWPA to draft the Agreement and act as escrow agent. *See*ECF No. 36 at ¶ 3. Under the terms of the Agreement, the purchase price of $300,000.00 was to be paid to the Seller by wire transfer to the account of WWPA or by cashier's check made payable to WWPA—IOTA account. ECF No. 19–1 at 2. The Agreement called for Solnes to pay the purchase price in two transactions—a $35,000.00 deposit and the remainder of the fee. *See id.*

* * *

Although the Agreement called for a $35,000 deposit, Solnes actually wired a $30,000 deposit to WWPA's IOTA Trust Account on May 5, 2011, and later wired the remaining $270,000 on May 23, 2011. ECF No. 36 at ¶ 4. WWPA, as escrow agent, held the deposit and purchase amount for the vessel. *Id.* The Closing was originally scheduled to take place on May 23, 2011, but it was pushed back to May 31, 2011. ECF No. 39 at ¶ 4. Defendant Wallis testified that he learned that the parties had pushed back the closing date shortly after May 23, 2011. *See* ECF No. 39 at 2. Despite Solnes's payment of the full purchase price, the *Symphony* never arrived at Solnes's predetermined place of delivery—Norway. *See* ECF No. 19 at ¶¶ 14–15. Solnes states that on July 9, 2011, he learned why: the *Symphony* was allegedly sold to another buyer and,

despite the Seller's representations in the Agreement, the Seller had never owned the vessel. *Id.* At ¶ 16.

Upon learning these circumstances, Solnes traveled to Defendants' office on July 14, 2011. *Id.* At ¶ 20. Solnes claims that when he arrived at WWPA's offices, Wallis's wife, Joan Wallis, advised him that the $300,000.00 that he had paid was still in the WWPA Trust Account. ECF No. 19 at ¶ 20, ECF No. 39 at ¶ 12. Solnes further alleges that Mrs. Wallis promised, on behalf of WWPA, to return his money on the same day, as contemplated by the terms of the Agreement in the event of Seller's default. *Id.* Defendants deny that Mrs. Wallis made any promise to return Solnes's money to him. ECF No. 36 at ¶ 12.

Sometime after July 14, 2011, Solnes claims to have spoken with Thibaut, who suggested that Solnes instead purchase a Princess 65–foot motor yacht. ECF No. 19 at ¶ 22. Solnes agreed to engage in negotiations regarding the replacement boat, but no final agreement was ever reached. *Id.*

Although the facts are not clear as to when the funds were disbursed, the parties do not dispute that, at some point, Defendants disbursed the $300,000.00 to Jack Thibaut. *See*ECF No. 36 at ¶¶ 7–8; ECF No. 19 at ¶¶ 23, 24. Wallis claims that at the time the escrow funds were disbursed, he thought that the closing on the vessel had taken place on May 23, 2011. *See* ECF No. 36 at ¶ 7. According to Wallis, he learned only later that Solnes and Thibaut had agreed to extend the closing date. *Id.*

Solnes, however, disputes Wallis's contention that at the time that the escrow funds were disbursed, Wallis was under the impression that the closing for the vessel had taken place. *See* ECF No. 39 at ¶

In this regard, Solnes points to the fact that Wallis disbursed a majority of the $30,000 deposit on May 6, 2011—well before the original May 23, 2011, closing date. [Footnote omitted] *Id.* Despite Solnes's repeated demands, to date, Defendants have not returned the $300,000.00 to Solnes. *See* ECF No. 19 at ¶ 27. Defendants claim that they distributed the money in accordance with the terms of the Agreement. *See* ECF No. 36 at ¶ 10. Moreover, Defendants contend that any funds that it distributed from WWPA's IOTA account prior to the closing date (*i.e.,* the $24,895 disbursement on May 6, 2011) were not funds that it received in relation to the vessel sale that is the subject of this matter. *Id.*

* * *

Solnes claims that on July 14, 2011, when he traveled to the offices of WWPA, Mrs. Wallis promised to hold the $300,000 deposit in the IOTA account for Solnes's benefit until the funds could be returned to him. According to Solnes, this alleged promise to refund the money constituted a new and separate express agreement by WWPA not to distribute the monies to Seller and

instead to hold the funds for the benefit of Solnes until the funds could be transferred back to him.

"A valid contract arises when the parties' assent is manifested through written or spoken words, or inferred in whole or in part from the parties' conduct." *Baron v. Osman,* 39 So.3d 449, 451 (Fla. 5th DCA 2010) (internal quotation and citation removed). An oral contract is subject to the basic tenets of contract law such as offer, acceptance, consideration, and sufficient specification of essential terms. *See St. Joe Corp. v. McIver,* 875 So.2d 375, 381 (Fla.2004) (citation omitted). A party who asserts an oral contract must prove its existence by a preponderance of the evidence. *Id.* (citing *Batista v. Walter & Bernstein, P.A.,* 378 So.2d 1321, 1322 (Fla. 3d DCA 1980)).

* * *

[N]o new agreement arose between the parties because of a lack of consideration. "It is a fundamental principle of contract law that a promise must be supported by consideration to be enforceable." *Office Pavilion S. Fla., Inc. v. ASAL Products, Inc.,* 849 So.2d 367, 370 (Fla. 4th DCA 2003) (citing Restatement (Second) of Contracts § 17 (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.")). This principle applies with equal force to the modification of a contract. *Id.; see also Schneir v. State,* 43 So.3d 135, 137 (Fla. 3d DCA 2010) ("like an initial contract, a modification or novation requires lawful consideration for its validity"). Consideration requires a return promise or performance. Restatement (Second) of Contracts § 71 (1981); *see also Johnson Enters. Of Jacksonville, Inc. v. FPL Group, Inc.,* 162 F.3d 1290, 1311 (11th Cir.1998).

Here, Solnes does not provide any evidence that the alleged new contract was supported by consideration. Even if Mrs. Wallis agreed to provide Solnes with $300,000, it does not appear that Solnes was required to provide any consideration for the actions of WWPA. Consequently, no mutual consideration exists to support the finding of a new express agreement between the parties or a modification of the existing Agreement . . . .

* * *

Defendants Wallis & Wallis, P.A., and Peter Wallis's Motion for Summary Judgment [ECF No. 21, 36] is GRANTED IN PART AND DENIED IN PART. . . .

Notes

(11) As articulated in the text of the preceding case, the court makes reference to Restatement (Second) of Contracts § 71 set out below. Readers are reminded of the hierarchy of legal support explained in Chapter 3.

State case law making this point is the best source, and resort to 'secondary' sources such as the Restatement (Second) is only directly applicable where there is no direct case law on point.

CMM Approach: Astute outliners of the material may have discovered this excellent source for "elements" and for "black letter law," so long as they are mindful of the hierarchy to be followed with regard to precedential value. Look for similar rules and elements in state case law in the cases. Often the rules are identical, which would mean that the state case law and the Restatement (Second) pronouncement are in fact the same – albeit utilizing different terminology or form. Where the rules are different, readers have in all likelihood latched onto a Florida-specific legal distinction.

RESTATEMENT (SECOND) OF CONTRACTS

§ 71. Requirement of Exchange; Types of Exchange

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

18. an act other than a promise, or

19. a forbearance, or

20. the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

(12) As is indicated in the case above, contracts may be oral or in writing. It may be more difficult to prove up the terms of a contract, through testimony, actions taken, etc., but such is fairly common. There are certain contracts where fraud is so likely that a law had developed to require a writing – *to prevent fraud*. The

'statute of frauds,' which lists those contracts which must be in writing to be enforceable, it addressed in Chapter 13.

(13) On the topic of legal hierarchy, readers will note that the case making this point is from a federal court, and is therefore not the most direct legal authority possible. Federal pronouncements of what Florida law is can be very helpful but not to be forgotten is the distinct, constitutionally guaranteed separation of state and federal authority.

(14) Readers should be ready for more Latin: courts and lawyers often use the term *quid pro quo*, or "something for something." Each side must have proffered something in return for what is expected from the other party. One of the driving impetuses is to provide more context to contract law. Therein lies the question, "Why would any situation where someone was not planning on giving anything up, or getting anything in return, involve contract law?" To what is assuredly a more complicated question, a relatively simple answer is that "Someone is probably trying to hide from the use of another law by trying to make a situation look like a contract." Two simple examples should suffice to make things clear. If someone wanted to give as a gift her valuable mansion to her children but avoid what may be a very high estate tax, she could *try* to sell it to them at a very undervalued price. If this were upheld, it would avoid the estate tax. Moreover, if someone wanted to bribe a government official but an outright gift would too directly establish the corruption, he could *sell* stock at a price well below value… the difference in sales price and actual value would be the amount of the bribe. Hence the adage about hiding 'a gift or a bribe in contractual clothing…' (or maybe it is 'a wolf in sheep's clothing.')

B. Benefit or Detriment

DORMAN v. PUBLIX-SAENGER-SPARKS THEATERS, INC.

Supreme Court of Florida, 1938

184 So. 886

BUFORD, Justice.
In this case plaintiff in error sued defendant in error filing a declaration in three counts. The first count of the declaration alleged:

'That the defendant, at the time of the institution of this suit and at the times hereinafter referred to, conducted and operated in the City of Gainesville, Florida, among others, two certain motion picture theatres commonly known respectively as the Florida Theatre and the Lyric Theatre; that at the times hereinafter referred to and for upwards of ten months next prior to the institution of this suit, the defendant, in connection with said motion picture theatres, conducted a scheme or plan of advertisement therefor commonly known as Bank Night; that by said scheme or plan the defendant proposed and advertised to the public in said City of Gainesville that on Tuesday night of each week the defendant would pay a certain sum of money on the succeeding Tuesday night to that person who attended said Florida Theatre or Lyric Theatre, or who was sufficiently near either of said theatres on the outside thereof to claim the said sum, by making the presence of such person known to the officers or agents of either said Florida Theatre or Lyric Theatre from within either of said theatres, from the lobby of either of said theatres, or from a point on the outside of either of said theatres, within a reasonable time on the night of the drawing after the name of the person entitled thereto was announced by or on behalf of the defendant from the stage of either of said theatres, the lobby of either of said theatres, or in front of each of said theatres, and that the name of the person to whom the said sum of money would be paid would be determined by having some blindfolded person chosen by or on behalf of the defendant draw from a cylinder on the stage of the Florida Theatre one of the numbers designated on the pieces of paper contained in said cylinder, and that the pieces of paper contained in said cylinder would disclose the respective numbers assigned by or on behalf of the defendant at the time of registering to such persons as had registered their names in books provided by the defendant for that purpose, and for the permission to make which registration the defendant made no charge whatsoever; that the sum which the defendant proposed and advertised as aforesaid the defendant would pay under the scheme or plan aforesaid on Tuesday, September 28, 1937, was the sum of $500.00: that on Tuesday, September 28, 1937, the plaintiff, pursuant to and in reliance upon the defendant's aforesaid plan or scheme, was present outside said Lyric Theatre and nearby thereto at the time the defendant caused to be determined under the plan or scheme aforesaid the name of the person entitled to receive said sum of $500.00, and at that time the plaintiff was one of those who had prior thereto, in conformity with the defendant's said plan or scheme, registered in one of the defendant's registration books provided for the purpose aforesaid.

That on Tuesday night, September 28, 1937, pursuant to and in conformity with defendant's said plan or scheme aforesaid, the defendant caused to be drawn on the stage of the Florida Theatre from the cylinder aforesaid, one of the pieces of paper containing the numbers of the registrants aforesaid, and that the number so drawn was the number which the defendant had assigned to the plaintiff at the time of the plaintiff's registration, and that the defendant then and there caused to be announced from the stage of said Florida Theatre that the plaintiff was entitled to the said sum of $500.00; that the plaintiff, at the time and place last referred to, within a reasonable time from plaintiff's name being announced by or on behalf of the defendant from the stage of the said Florida Theatre as the name of the person entitled to said sum of $500.00, did from the nearby proximity of said Lyric Theatre and from the lobby thereof make the presence of the plaintiff known and claim said sum of $500.00, to the employees of the defendant at the box office of said Lyric Theatre and the lobby of said Lyric Theatre, and did keep and perform each and every act and thing required of the plaintiff by the terms of the defendant's aforesaid plan or scheme, to entitle the plaintiff to receive from the defendant the said sum of $500.00, nevertheless, the defendant, in violation of its said proposal and undertaking, did then and there refuse, and at all times thereafter has continued to refuse, to pay to the plaintiff said sum of $500.00, or any portion thereof.'

There are no material differences between the first count and the second and third counts. The same cause of action is alleged in slightly different language, but the basic facts are alleged alike in all counts.

* * *

The first three questions submitted by defendant in error in its brief are as follows:

'Did the published proposal or advertisement to give away a sum of money under the plan of bank night alleged in the declaration constitute or result in an offer to enter into a binding legal contract which could become effective by one merely attending the drawing and not purchasing a ticket of admission?

'Did not the proposal and advertisement to give away a sum of money under the plan of bank night alleged in the declaration constitute a mere published notice of voluntary intention to make a gift as distinguished from an offer to contract?

'Does presence at or near a place in anticipation of receiving a gift or gratuity constitute a consideration or convert a mere published intention to make a gift at such place into a contract or create legal responsibility for refusal to make a gift?'

* * *

The first question to be determined is whether the offer of the Theatre Company is one to make a gift upon condition or one for a binding contract upon acceptance and performance of the terms of the offer.

In Williston on Contracts, Vol. 1, Sec. 112, p. 232 (1920 Ed.) it is said:

'If a benevolent man says to a tramp,—'if you go around the corner to the clothing shop there, you may purchase an overcoat on my credit', no reasonable person would understand that the short walk was requested as the consideration for the promise, but that in the event of the tramp going to the shop the promisor would make him a gift. Yet the walk to the shop is in its nature capable of being consideration. It is a legal detriment to the tramp to make the walk, and the only reason why the walk is not consideration is because on a reasonable construction, it must be held that the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise. It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration. On the other hand, if, as in the case of the tramp stated above, the happening of the condition will be not only of no benefit to the promisor but is obviously merely for the purpose of enabling the promisee to receive a gift, the happening of the event on which the promise is conditional though brought about by the promisee in reliance on the promise will not properly be construed as consideration.'

Applying the test set out by Williston we find that if the attendance by the public (of which plaintiff in error was one) or the registration of the public was a benefit to the promisor, it is a fair inference that the attendance and registration were requested as a consideration. And it is axiomatic in the law of contracts that a benefit flowing to the Theatre Company from a third party is sufficient consideration irrespective of whether there is a benefit flowing from the promisee. Page on Contracts, Vol. 1, Section 531 (1919 Ed.). It is not necessary that the registration or presence of plaintiff in error alone should supply this benefit.

In 13 C.J., Contracts, Section 150, p. 318, it is said:

In the matter of a benefit, a mere expectation or hope, or a contingent benefit, is sufficient, as, for example, the expectation of advantage or profit from the thing promised.'

Thus, it is immaterial whether or not the presence of the participants in ‘bank night’ actually increased defendant in error's box office receipts. The hope or expectation that it would was sufficient. Under this rule we are of the opinion that the registration and attendance of the public were a benefit to the Theatre Company.

Since the requested acts (registration and attendance at the theatre) resulted in a benefit to the Theatre Company, and were done on the faith of the promise to pay, such acts must be regarded as having been requested as the consideration for a valid and binding contract rather than as mere conditions to a promise to make a gift.

The next question presented is whether or not the registration and attendance of the plaintiff in error is sufficient consideration to support a contract, a breach of which would subject the promisor to liability for damages.

The consideration required to support a simple contract need not be money or anything having monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee. Williston on Contracts, Vol. 1, Sec. 102 (1921 Ed.); Elliott on Contracts, Vol. 1, Sec. 203 (1913 Ed.); [citation omitted].

‘It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction. Indeed, there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.’ 13 C.J., Contracts, Sec. 150, pp. 315, 316. See, also, Henderson v. Kendrick, 82 Fla. 110, 89 So. 635, Bigelow v. Bigelow, 95 Me. 17, 49 A. 49.

It stands admitted on the record that at the time of this particular drawing, Mrs. Dorman, the plaintiff in error, ‘pursuant to and in reliance upon the defendant's aforesaid plan and scheme, was present outside said Lyric Theatre and near thereto’ and that plaintiff in error ‘was one of those who had prior thereto, in conformity with the defendant's said plan or scheme, registered in one of the defendant's registration books, provided for the purpose aforesaid.’ Both of these acts involved the doing by Mrs. Dorman at defendant's request of something which she not only was under no obligation to do, but had a right not to do. Therefore, such acts come well within the accepted definition of ‘legal detriment’ and were in themselves ample consideration for defendant's agreement to pay, regardless of whether they were of any pecuniary value. See Earle v. Angell, 157 Mass. 294, 32 N.E. 164, which held that attendance at the funeral of promisor pursuant to the

latter's request and agreement to pay the promisee $500 if he would do so was sufficient consideration to support the agreement, and that having performed, the promisee could recover the $500 in an action against the promisor's estate.

* * *

For the reasons stated, the judgment is reversed and the cause remanded with directions that it be returned to the rolls and further proceedings be had in accordance with law and practice.

So ordered.

Notes

9. It is important to reflect on the expansive nature of consideration. It can be money, as in a simple, unilateral sale of goods for cash. It can also be mutual promises (i.e., "bilateral"), such as when someone promises to pay for the painting of the garage and another promises to paint the garage in a workmanlike fashion. It can even be something negative to one party – a detriment – so long as this is what the other party requested. Thus, payment of a sum of money if another party refrains from building a fence around his or her property, if that other party otherwise has the right to build a fence, would be upheld. Then again, this may not be the best example, because one can imagine a tangible benefit – an unobstructed view. Readers should remember from the preceding case that valid legal consideration can even be supplied by a third party without establishing a benefit from, or a specific detriment to, the promisee. For example, what if someone promises payment for her daughter to exercise every day at the local gym? The health benefits seem exclusive to the daughter without a real benefit to the promisor mother. Some states would find a lack of consideration to the mother for this bargained-for detriment, but Florida courts would most likely uphold this as a valid agreement. *See, e.g., Mangus v. Present*, 135 So. 2d 417 (Fla. 1961) (an injury or inconvenience to the promise suffices as valid consideration).

10. Those who are taking property law may recognize that the preceding case mentioned the personal property topic of gifts law. The consideration question is an area that will often require consideration of the intersection of contract law with other laws, such as the property law of gifts, tax law, etc.

C. Forbearance

Parties that voluntarily give up some legal right that they would otherwise be able to assert are providing valid consideration. For example, if an accident victim forbears to sue in tort for a lump-sum payment, this agreement would be enforceable because it is backed by consideration. (Recall the "fence" example in the preceding note). Readers of nationally-based case books may recall some confusion over the fact that a promise not to sue a person in paternity, when it is later established that he was not the father, nevertheless constituted valid consideration.[15] The status of paternity was not known at the time of the promise and was therefore possible. The only requirement for the forbearance to qualify as valid consideration is a *bona fide* belief in its validity, as the next case demonstrates. Furthermore, it was possible to characterize the bargain as the desire to keep news of the incident out of the news.

CITIBANK INTERNATIONAL v. MERCOGLIANO
District Court of Appeals of Florida, Third District, 1991
574 So. 2d 1190

LEVY, Judge.

Citibank International appeals an adverse summary judgment in its foreclosure action which involved a note and mortgage executed by appellee, Diane V. Mercogliano, as a payback for funds which had been embezzled from Citibank by a friend of Mercogliano. Mercogliano had purchased a home using, in part, embezzled funds in the form of a check made payable directly to the seller for the sum of $70,987.93. The check was a Citibank manager's check, endorsed by one Elmer Figueroa, who was an officer of Citibank and a friend of Mercogliano. The check represented funds which had been embezzled from Citibank by Figueroa.

Citibank eventually traced the funds, and contacted Mercogliano to notify her of the embezzlement and to discuss payback of the funds. Mercogliano executed a promissory note and second mortgage on her property, in favor of Citibank, stating that she felt a moral obligation to pay back the money. In consideration for the note and mortgage, Citibank stopped its investigation regarding the embezzlement as it pertained to Mercogliano and, furthermore, did not pursue any civil legal remedy against her.

Thereafter, Mercogliano defaulted on the note and Citibank filed a foreclosure action. Mercogliano answered and claimed the affirmative defense of lack of consideration. She also counterclaimed for rescission under the Federal Truth in Lending Act and Regulation Z. The trial court entered summary judgment in favor of Mercogliano, both on the foreclosure action and on her counterclaim

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for rescission, and awarded her attorney's fees and costs pursuant to her claim under the Federal Truth in Lending Act.

Because there was forbearance by Citibank in connection with Mercogliano, we find that the trial court erred in ruling that there was a lack of consideration sufficient to enforce the promissory note and mortgage. It is well settled Florida law that forbearance from pursuing a legal remedy, where the promisee has a bona fide belief that a viable legal right exists, constitutes valid consideration for an agreement which benefits the promisor. [Citations omitted] Even if the legal right is of doubtful validity, it can still constitute valid consideration sufficient to support a contract or promise where the promisee has a bona fide belief of a fair chance of success in the lawsuit. *Henderson v. Kendrick,* 82 Fla. at 110, 89 So. at 635. Furthermore, it is not necessary that the forbearance be promised or mentioned expressly in the language of the agreement. *Boymer v. Birmelin,* 227 So.2d 358 (Fla. 3d DCA 1969). As this Court stated in *Boymer v. Birmelin,* 227 So.2d at 362:

> It is well recognized that forbearance to enforce a legal right may constitute consideration for a promise. It is not required that the forbearance be provided for in express language or terms. This is so because a request by the promisor or undertaking by the promisee to forebear may be implied from conduct of the parties and the nature of the transaction. Consideration is supplied when the circumstances are such that it is reasonable to infer that forbearance was desired and sought by the promisor and forbearance by the promisee follows.

In the present case, it can be implied from the conduct of the parties and the nature of the circumstances that Citibank, as well as Mercogliano herself, had a good faith belief that there was a viable claim against Mercogliano which could be pursued by Citibank if Mercogliano did not execute the subject documents. At the least, Citibank had a colorable claim against Mercogliano under the theory of constructive trust. [Footnote omitted] Accordingly, we find that there was forbearance on the part of Citibank. Thus, the mortgage and note were valid and the bank is entitled to proceed to foreclose on the mortgage based upon Mercogliano's default.

As to that part of the summary judgment obtained by Mercogliano relating to her counterclaim for rescission under Regulation Z, we find that, in view of the facts of this case, particularly regarding the timing and sequence of events that occurred in this case, Regulation Z of the Federal Truth in Lending Act was rendered inapplicable. Thus, the court incorrectly held that Citibank violated the disclosure requirements of Regulation Z. As a result, the award of attorneys fees under the Act was improper.

Accordingly, we reverse the entry of summary judgment in Mercogliano's favor both on the foreclosure action and her counterclaim for rescission, and reverse the award of attorneys fees and costs. The bank is entitled to proceed with its foreclosure action.

Reversed and remanded for further proceedings consistent with this opinion.

2. Sufficiency vs. Adequacy

As mentioned as the beginning of this Chapter, readers must understand that the following two terms may not be interchanged: sufficiency and adequacy. For a finding of valid consideration that will support a contract, it must be sufficient. Consideration will be *sufficient* to support the contract if the law finds value in it. On the other hand, *adequacy* is a term that is applied to the value amount. Courts have found that the law cannot typically decide on what is adequate versus inadequate; as a result, courts will generally not inquire into adequacy of consideration. In the next case and notes, readers will be introduced to scenarios where Florida courts have found a lack of consideration, based on insufficiency.

A. Sufficiency

C. P. COOPER, EXECUTOR OF JOHN ROBERTS, DECEASED v. C. O. LIVINGSTON

Supreme Court of Florida, 1883

19 Fla. 684

THE CHIEF-JUSTICE delivered the opinion of the court:

Livingston, plaintiff below, sued on a promissory note made by John Roberts to Mrs. E. G. McGruder, December 29th, 1876, for $250. Defendant pleaded “on equitable grounds” that the note was given without consideration; that the payee extorted the note from Roberts in his last sickness, while weak in mind and body, upon her promise to cure him by conjuring and incantations. Roberts died a few weeks after giving the note. Defendant further avers that plaintiff was not an innocent purchaser for a valuable consideration, but bought the note with full knowledge of the origin of the note and the illegality of the consideration. The plea was sworn to and plaintiff took issue thereon.

A trial was had before a referee, who found for the defendant, and on appeal the judgment was reversed. Upon a second trial the referee found for the plaintiff, and the defendant now appeals.

* * *

A comparison of the testimony given upon both trials shows a very substantial difference in several respects. We state briefly the testimony given upon the last trial.

* * *

The foregoing is all the material testimony bearing upon the issues. By a comparison of this testimony with that given upon the former trial by Mr. Cooper, Mr. Ledwith and the plaintiff, it will be seen that while the testimony of Ledwith and Cooper is more distinct and positive, that at the conversation between them at the time the note was presented for payment Mr. Livingston expressly said that the note was given by Mr. Roberts in his last sickness to Mrs. Magruder "for conjuring him to make him well," as stated by Mr. Cooper; and "that Mrs. Magruder had been conjuring Mr. Roberts, and that was the nature of the claim;" and "that the note was given to Mrs. Magruder for conjuring Mr. Roberts," as testified by Mr. Ledwith. Then they both testify that Livingston expressly stated that he knew at the time he traded for the note the kind of services she had rendered; that it was for conjuring, as before stated.

* * *

Is "conjuring" for the purposes mentioned a good consideration for the promise to pay? "*Conjuration* signifies a plot or compact made by persons combining by oath to do any public harm, was more especially used for the having personal influence with the devil or some evil spirit, to know any secret or affect any purpose. Hawkins, in his Pleas of the Crown, says that conjurors are those who, by force of certain magic words, endeavor to raise the devil and oblige him to execute their commands." Tomlin's 50. Dict. And such persons were punished as rogues and vagabonds. 4 Bl. Comm., 60. According to Noah Webster *conjuration* is the act of using certain words or ceremonies to obtain the aid of a superior being, the act of summoning in a sacred name, the practice of arts to expel evil spirits, allay storms or perform supernatural or extraordinary acts. *Conjurer,* one who practices conjuration; one who pretends to the secret art of performing things supernatural or extraordinary by the aid of superior powers; an impostor who pretends by unknown means, &c.

Our conclusion is that "conjuring" over a sick man "to make him well" is not a valid consideration for a promissory note; and that no man with a healthy mind would voluntarily give a note for $250, with interest at two per cent. A month, for the services of a conjurer, who proposes to cure a lingering disease by conjury or incantations.

The necessary conclusion is that the plaintiff upon the case made is not entitled to judgment. The onus of showing a valid consideration for the giving of the note was thrown upon him by the proof that the consideration was at least doubtful, and that he knew it when he bought the paper. He failed to show a good and valuable consideration, but submitted his case upon proofs which negative his right to recover.

* * *

The judgment is reversed and a new trial granted.

FLORIDA NAT. BANK AND TRUST CO. AT MIAMI v. HAVRIS
District Court of Appeal Third District, 1979
366 So. 2d 491

CARROLL, Associate Judge.

The plaintiff below, Florida National Bank and Trust Company at Miami, as guardian of Ina M. Garrett, incompetent, filed this appeal from the final judgment entered following a non-jury trial.

A defendant, Mrs. Charles A. Carter, was the employed housekeeper and attendant of Mrs. Garrett from 1973 to 1975, and was so employed when the involved activities relating to Mrs. Garrett's money and residence property took place. During this period, Mrs. Garrett, who was 94 years of age in 1975, lived alone with the housekeeper in Miami, in a home which she owned. The defendant Mary 50. Havris, a niece of Mrs. Carter, the housekeeper, was not related to Mrs. Garrett, and was not her employee.

Mrs. Garrett had funds on deposit in certain savings associations and banks. With Mrs. Garrett's consent, the housekeeper and her niece Mary Havris became authorized to sign checks on Mrs. Garrett's said accounts, and during the interval of time above mentioned, by withdrawals and transfers, the funds of Mrs. Garrett became placed in bank accounts of Mrs. Havris and of Mrs. Havris and her husband, from which monies needed for care expenses of Mrs. Garrett were used.
In 1975, on March 19, Mrs. Garrett made a deed by which she conveyed her home and the furniture and fixtures therein to Mary 50. Havris, reserving to Mrs. Garrett a life estate and right of possession. That deed was not recorded.

Nine days later, on March 28, 1975, a second deed of her home property was made by Mrs. Garrett to herself and to Mary Havris, as joint tenants with right of survivorship. That deed was recorded on the date upon which it was executed.

On October 17, 1975, in a proceeding which had been commenced on September 3, 1975, to determine competency of Mrs. Garrett, the plaintiff bank was appointed guardian of Mrs. Garrett's property and Ina M. Porcella, a niece of Mrs. Garrett, was appointed guardian of her person.

On January 7, 1976, the plaintiff bank, as guardian of the property of Mrs. Garrett, filed this action against Mrs. Havris and her husband and Mrs. Carter. Thereby, the plaintiff sought judgment to invalidate the recorded joint tenancy deed dated March 28, 1975, and to require the defendants to account to plaintiff for monies of Mrs. Garrett which had been obtained and were held by them.

* * *

“From the foregoing facts, the Court concludes:

“CONCLUSIONS OF LAW

* * *

With regard to the first deed, made by Mrs. Garrett to Mary Havris reserving to the grantor a life estate and right of possession, the finding of the trial court as to consideration was that the grantee paid no consideration, and that the conveyance was made “in consideration of love and affection.” Likewise, as to the second deed purporting to create a joint tenancy in Mrs. Garrett and Mary Havris, the court found that deed was made “in consideration only of love and affection.”

We hold, as contended by appellant, that the two deeds by which this 94-year old woman transferred her home property to Mary Havris were without consideration and were invalid. In holding the unrecorded deed of March 19, 1975, was valid, the trial court misapprehended and misapplied the law, by concluding that love and affection of or towards one not a blood relation of the grantor constituted adequate consideration for Mrs. Garrett's deeding of her property to Mary Havris, to whom she was not related.

Florida Jurisprudence, Deeds s 59, in discussing the question of whether or not love and affection constitutes good consideration, states, “ * * * However, there must be some blood or marriage relationship between the grantor and the grantee. * * * ” Said statement is derived from the English Rule which requires that in order for love and affection to be good consideration for a conveyance, said love and affection must be toward one to whom a natural duty exists, such as near relatives by either consanguinity or affinity. See 23 Am.Jur.2d, Deeds s 65; 349 Am.Jur.2d, Estates s 349 and cases cited in footnote 7. Most American cases are in accord with the English Authorities. In

Watson v. Watson, 24 S.C. 228 (1885), the Supreme Court of South Carolina in dealing with a conveyance where love and affection was the consideration, stated in part as follows:

" * * * * The Circuit Court held the deed in question here a covenant to stand seized, * * *.

" * * * * This conveyance has the same force and effect as a common deed of bargain and sale, but the great distinction between them is that the former can only be made use of among domestic relations, for it must be founded on the consideration of blood or marriage. No use can be founded for any purpose by this conveyance in favor of a person not within the influence of the domestic consideration; and it makes no difference whether the grantee, if he be a stranger to the consideration, is to take on his own account or as a mere trustee for some of the family connections. He is equally incompetent to take. The existence of another consideration in addition to that of blood or marriage will not impede the operation of the deed. * * * "

In Florida decisions upholding conveyances where the basis for consideration was love and affection, express or implied, with absence of any other consideration recognized in law as adequate, the relationship of the grantor and grantee has been a blood relationship or a relationship of marital affinity. See Waterman v. Higgins, 28 Fla. 660, 10 So. 97 (1891); Wise v. Wise, 134 Fla. 553, 184 So. 91 (1938); Vazquez v. Santisteban, 334 So.2d 97 (Fla. 3d DCA 1976).

It was the finding of the trial court that the only consideration for these deeds was love and affection. Since under the law that can constitute consideration only as to one who is related by blood or marital affinity (which this grantee was not), the deeds were without consideration.

However, the appellees argue that aside from love and affection there was adequate consideration for the deeds, in that, as acknowledged by Mrs. Garrett, the grantee Mary Havris previously had been kind and helpful to Mrs. Garrett, and was her good friend. We hold that argument to be without merit.

The trial court did not find such factors to be consideration. There was no contract or legal obligation to pay for such prior acts of Mrs. Havris, nor were those gratuitous acts of Mrs. Havris of a kind or character for which a legal obligation to pay for them existed or could be implied. As such, they were not adequate consideration for the deeds: See Florida Nat. Bank & Trust Co. v. Brown, 47 So.2d 748 (opinion on rehearing 758, 761), and 17 C.J.S. Contracts s 116 wherein it is said:

> Except to the extent that statutes may otherwise provide, by the great weight of authority a past consideration, if it imposed no

> legal obligation at the time it was furnished, will support no promise whatever; or, as the rule has been stated otherwise, an executed consideration is no consideration for any promise other than that which the law would imply. A past consideration is insufficient, even though of benefit to the promisor, where the services rendered or things of value furnished are intended and expected to be gratuitous, * * *

Nor did the fact that Mrs. Havris may have been or was considered by Mrs. Garrett to be her “good friend” constitute consideration for the conveyances. During the time this friendship existed, Mrs. Garrett's money on deposit, and that which she would have received as income, was diverted by Mrs. Havris to the latter's bank accounts. When the court ordered Mrs. Havris to return Mrs. Garrett's money, $19,000.00 thereof could not be produced by Mrs. Havris, against whom subsequently judgment was entered for that amount. “With a friend like that, ?” See the trial court's above quoted findings of fact Nos. 19, 20 and 21.

Accordingly, the provisions contained in the judgment are affirmed, but the judgment is hereby supplemented and amended to include therein a further holding as follows: “The unrecorded deed dated March 19, 1975, from Ina M. Garrett to Mary 50. Havris, of the home property of Mrs. Garrett, described as Lot 6, in Washington Place, according to the plat thereof, recorded in Plat Book 20, at Page 54, of the Public Records of Dade County, Florida, together with improvements thereon and the furniture and fixtures therein, with reservation of a life estate in the grantor, is hereby held and declared to be invalid and of no force or effect.”

The judgment, as herein supplemented and amended, is affirmed.

Note

The last case was disavowed by the Florida Supreme Court in *Chase Federal Sav. and Loan Ass’n v. Schreiber*, 479 So. 2d 90 (1985), but on the ground that a written deed suffices in place of consideration. Astute readers may have noted that the last case involved a deed rather than a contract, and there is in fact a significant distinction between a contract for purchase or sale of an interest in real property, and the deed that must follow for conclusion of title transfer. (*See supra* Chapter III on *executory contracts*). There are unique real property and constitutional issues involved, but the idea that love and affection is not valid consideration is relatively common, and in the case of contracts, would probably not make exception even for family members. At minimum, readers should treat ‘love and affection’ as in improbable, legally recognized return consideration – though it is often the case that a court tries to save an agreement to avoid injustice. (Stretches of fairness ‘in law’ which

are actually based on equitable considerations do not make the study of contracts any simpler). Things to take away: (1) love and affection in a contractual sense is probably not valid consideration; (2) deeds follow different rules (rules of property law) and may dispel with the need for consideration if their legal formalities are satisfied; and (3) there is a significant interplay between contract law and property law which should be understood, especially in light of the fact that the Florida Board of Bar Examiners often tests on more than one area of law in many of its questions on the essay portion of the Florida Bar Exam.

B. Adequacy

BAYSHORE ROYAL COMPANY v. DORAN JASON COMPANY OF TAMPA, INC.[16]

District Court of Appeal of Florida, Second District, 1985
480 So. 2d 651

LEHAN, Judge.

The defendant, Bayshore Royal Company (Bayshore), appeals a final summary judgment entered in favor of plaintiff, The Doran Jason Company of Tampa, Inc. (Jason), in plaintiff's suit against defendant for real estate brokerage commissions. The obligation of Bayshore to Jason for the commissions arose from a transaction which preceded the execution of the contract between them which is the subject of this suit. That the obligation arose is not in dispute. What is disputed is whether Bayshore was released from the obligation by that contract.

The summary judgment, which we can find no basis to affirm, does not indicate its basis except to track wording of Rule 1.510(c), Florida Rule of Civil Procedure. From argument of counsel and Jason's latest motion for summary judgment it appears that the basis was that a certain so-called liquidated damages clause in paragraph 6 of the contract which contained language appearing to release Bayshore from liability for the commissions was found to constitute an unlawful penalty and was, therefore, found to be unenforceable. That clause provided that Bayshore would be released from liability for the commissions if Jason went into default under a separate loan agreement of Jason, partially guaranteed by Bayshore, with a third party, Canadian Commercial Bank (CCB). Paragraph 6, in pertinent part, reads as follows:

> the event of ... any default by ... [Jason] under any instrument delivered by [Jason] to CCB in connection with the Loan [to Jason from CCB] ... [Jason] agree[s] that in addition to any other right or

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> remedy Bayshore may have, ... Bayshore shall be automatically released from any liability for the brokerage commission....

There is no dispute that Jason did go into default on its loan from CCB.

We reverse. We conclude that the issue relative to that clause involved the adequacy of sufficiency of the consideration for the contract between Bayshore and Jason. More specifically, we conclude that this contractual provision under which Jason conditionally promised to release Bayshore from liability for the commissions constituted consideration provided by Jason for Bayshore's reciprocal promise to Jason to guarantee the CCB loan and did not constitute a liquidated damages clause which could be found to be an unlawful penalty. In summary, our reasoning for reversing is that since (a) penalties of the type apparently found to be unlawful in this case arise out of purported liquidated damages clauses, (b) such clauses, of course, can only exist when they provide for damages, and (c) the clause in question did not provide for damages but represented consideration for the contract, no such penalty could be found to exist.

* * *

This distinction between a clause representing damages for breach of a contract and a clause constituting consideration for a contract might be thought of as a “legal technicality.” However, which legal test properly applies in this case depends upon first identifying the category of law involved. As is pointed out above, whether the issue in this case belongs in the consideration category of the law or in the damages category is of substantial possible significance. It is sometimes not understood by laymen that so-called legal technicalities often have been created to achieve fairness and consistency in the law. The result reached in the trial court in this case (the apparent refusal to recognize as valid the wording of paragraph 6 releasing Bayshore from its commission obligation to Jason) by evidently using the damages category might be thought of as fair. Paragraph 6 was in consideration for Bayshore's partial guaranty of Jason's loan from CCB, and, as explained further below, Bayshore was ultimately required to pay nothing to CCB on that guaranty. But that result was reached with the perspective of judicial hindsight. In a contract case like this in the consideration category what is fair in the making of a contract should be determined principally by ascertaining what the parties to the contract freely and voluntarily agreed upon. The third part of the remainder of this opinion deals with finally ascertaining whether they actually agreed upon what paragraph 6 by itself seems to reflect.

* * *

The promise by Jason to release Bayshore from liability for the commissions was part of Jason's consideration for Bayshore's agreement to guarantee Jason's obligation to CCB. It is not the province of a court to relieve one party

of its contractual obligation on the basis of a judicial determination merely as to the adequacy of consideration given for the obligation. In other words, it would not be the province of a court in this case to relieve Jason of an obligation to release Bayshore from liability for the commissions on the basis of whether or not such an obligation of Jason, part of Jason's consideration for Bayshore's guaranty promise, was excessive in relation to that guaranty promise or, on the other hand and perhaps more to the point, whether Bayshore's guaranty promise, which was its consideration for the obligation of Jason, was sufficient to support the enforceability of the obligation.

The court will not ordinarily inquire into the adequacy of the consideration. And the court will not interfere with the facility of contracting and the free exercise of the will and judgment of the parties by not allowing them to be sole judges of the benefits to be derived from their bargains, provided there is no incompetency to contract, and the agreement violates no rule of law. As the law will not stop to scrutinize the amount of benefits conferred upon one party, so neither will it scan the extent of trouble, loss, or obligation the other party has subjected himself to.

Mere inadequacy of consideration is not a sufficient cause for rescinding or canceling a contract unless the inadequacy is so gross as to afford proof of actual fraud or unless the inadequacy is accompanied by other circumstances, such as weakness of mind or the like.
Consideration may consist of either a benefit to the promisor or a detriment to the promisee.... It is, however, sufficient if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do. A contract may be supported by any detriment or inconvenience, however small, sustained by one party, if it is by the express or implied consent of the other party.

11 Fla.Jur.2d *Contracts* § 63, at 355-57 (1979). These settled, general principles of law are thought to have been established by Lord Coke's "peppercorn theory" of consideration. E. Farnsworth, *Contracts* § 2.11, at 66 n. 2 (1982), quoting from *E. Coke on Littleton* 222 (1628) ("and yet if the rent were by one graine of wheat, or one seed of comyn, or one pepper corne ...").

Jason points out that Bayshore did not have to pay CCB because, as is undisputed, after Jason's default Jason renegotiated the loan from CCB which resulted in the release of Bayshore from the guaranty. Therefore, it is argued by Jason that Jason's foregoing obligation in paragraph 6 constituted an unlawful penalty because it was totally out of proportion to Bayshore's guaranty to CCB. However, as we have explained, no penalty was involved. Also, under the law applicable to consideration for contracts the fact that Bayshore was not required to make good on its guaranty is not in itself determinative. There is no dispute that Jason was in default for approximately

four months under its obligation to CCB, thus, as CCB advised Bayshore, exposing Bayshore to liability on the guaranty. As far as our review of this appeal at this stage of the litigation is concerned, that default could be considered to have brought into effect the contractual provision that Bayshore was released from liability for the commissions. The fact that Bayshore did not actually pay CCB is irrelevant to whether Bayshore's guaranty of the CCB loan was valid consideration in Bayshore's contract with Jason. Surely the exposure of Bayshore to that liability was a contingent liability of Bayshore reflecting upon its financial condition, thus being a detriment to Bayshore. But even assuming arguendo no detriment therefrom to Bayshore, Bayshore's guaranty promise appears to have met the test for sufficiency of consideration.

> [I]t is not essential in order that a promise shall be sufficient consideration that its performance will certainly prove detrimental to the promisor or beneficial to the promisee. A conditional promise is sufficient consideration. The performance of such a promise does not necessarily involve either detriment or benefit, since the condition upon which any action of the promisor is to take place may not happen. But the possibility that the condition may happen involves a chance of detriment which is sufficient to make the promise valid consideration.
>
> 1 S. Williston, *supra,* at 394-95. *See also* 1 A. Corbin, *supra,* at § 148.

A conditional promise may be sufficient consideration, and "when a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration."

> 1 S. Williston, *supra,* at 444. *See also* A. Corbin, *supra,* at § 148.

Jason's promise contained in paragraph 6 was a conditional promise, conditioned upon a default by Jason to CCB. Bayshore's guaranty promise was actually not a conditional promise except to the extent its ultimate performance was conditional upon Jason's default to CCB and upon CCB thereafter calling upon Bayshore to pay, which CCB apparently did not do; it was a promised guaranty of an existing obligation of Jason to CCB. But even to the extent that, as seems to be the effect of Jason's argument indicating that Bayshore had no real obligation to CCB unless and until Bayshore was called upon to pay CCB, Bayshore's promise could be construed in that sense as a conditional promise, it was nonetheless valid consideration . . . .

Reversed and remanded for proceedings consistent herewith.

Notes

8. There is a common trick regarding fungible consideration, 'fungible' meaning something that is mutually interchangeable or is typically addressed in a more non-specific, generic way such as "wheat." A promise to provide 100 bushels of wheat tomorrow for taking 100 bushels of wheat today is probably a transaction that lacks consideration. However, if there is some demonstrable difference that might be bargained for, then there me be consideration. Consider the following (different) example: "I will give you 300 bushels of winter wheat in 2 months when it is ready, if you give me 400 bushels of summer wheat be week's end." The offeror needs some wheat now for some reason. Perhaps the offeree does not grow winter wheat, and would like to trade for a right to collect winter wheat at some point in the future. The latter represents valid consideration on both sides.

9. A perceived inadequacy of consideration, when a court will actually move beyond the sufficiency question, is often a sign of an ulterior motive on the part of one or both parties to a contract. The parties may be trying to characterize something as a contract that should be treated pursuant to other area of law such as property law, tax law, etc.

10. Readers should be prepared for some confusion when analyzing the *Bayshore Royal, supra,* and *Pullum, infra,* cases. Complicated business dealings make it difficult to derive a simple factual basis from which to comprehend the law and its application. Sometimes, simple cases are not available to make important points. (Have you ever wondered why all cases in a casebook are appellate ones?). Also, think of the *Pullum* case's references to 'mutuality of obligation' as questions of 'consideration,' of the potentially *illusory* kind, and try not to confuse it with the fourth element of contract formation.

11. Perhaps a simple example of sufficiency vs. adequacy is in order. If a colleague came up to you in front of a soda vending machine and offered you $10,000 for the soda in your hand, would you not think that something was wrong? A gift, a bribe, but not a contract? What if the colleague was crawling out of a desert, after days of liquid-free suffering miles from the nearest convenience store, and offered you $10,000? This is an example where one side of the consideration may seem legally insufficient, prompting resort to the adequacy test – the former failing the test and the latter perhaps satisfying it.

Problem 5-1

Oscar is in market to purchase a new home after recently moving to the area. He visits Allen, who is trying to sell his house, and offers to purchase the house for $450,000. Allen's home was recently appraised at $500,000. Allen accepts the offer. Was there sufficient consideration? Was there adequate consideration? Explain.

Problem 5-2

Same facts as the previous question, but Oscar offers to purchase the house in exchange for a set of golf clubs. Allen accepts the offer. Was there sufficient consideration? Was there adequate consideration? Would it be different if the golf clubs had previously belonged to Tiger Woods? Explain.

Problem 5-3

Alex, an avid baseball enthusiast, had been trying to sell his car for a few months to be able to buy season tickets to his favorite baseball team's games. Olivia, knowing that Alex was eager to sell his car and would possibly exchange it for autographed baseball cards, forged the autograph of fifteen baseball players who had been inducted into the MLB Hall of Fame. Olivia offered Alex these fifteen "autographed" baseball cards in exchange for his vehicle, and Alex eagerly accepted. Was there sufficient consideration? Was there adequate consideration? Explain.

3. Output, Requirements and Exclusive Dealings Contracts

One would think that a promise to buy as much (or a specific percentage) of a product or raw material as one needs, where the orderor may exercise the whims of his or her fancy, would be insufficient consideration. Take for example the phrase, "I will buy all of my copy paper needs this year from you at $100/ream of paper, if I want to." This promises nothing and would in fact fail as consideration, thereby preventing contract formation. Even without the phrase "if I want to," a commitment to purchase all (or a set percentage of) one's requirements, or to sell all (or a set percentage of) one's output can still appear to be illusory. The U.C.C., and Florida's adoption of same, have fixed this problem by implying in law the quantity, i.e., how much would be purchased or supplied if acting in good faith? For example, a retailer buying requirements of sweaters could try to stop selling, and therefore from purchasing, sweaters from a supplier. However, a court could determine that amount of sweaters that the retailer would be ordering for resale if the retailer were acting in good faith." *Cf. supra* the Chapter IV discussion on U.C.C. Article 2 gap-fillers.

PULLAM v. HERCULES INCORPORATED

District Court of Appeal of Florida, First District, 1998
711 So. 2d 72

ERVIN, Judge.

This is an appeal from a final workers' compensation order denying a petition for benefits filed by claimant Johnny Pullam against Hercules Incorporated (Hercules). We agree with claimant that the judge of compensation claims (JCC) incorrectly concluded that Hercules could not be considered claimant's statutory employer under the terms of section 440.10(1)(b), Florida Statutes (1991). We therefore reverse and remand for further proceedings.

On December 9, 1992, claimant, who was employed by B.G. Swilley Trucking Company (Swilley or subcontractor) to remove pine stumps from land owned by St. Joseph Land and Development Company (St.Joe), severely lacerated his right arm. At such time, Swilley had no workers' compensation coverage. Claimant subsequently filed a petition for medical benefits against Hercules on the theory that it was his statutory employer, because Swilley was performing work that Hercules had delegated to it under a contract between Hercules and St. Joe. Claimant based his claim on section 440.10(1)(b), which provides:

> In case a contractor sublets any part or parts of his contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment; and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

Hercules' status as a statutory employer depends upon whether, in the words of the statute, it is a "contractor [who] sublets any part or parts of his contract work to a subcontractor." In order for Hercules to be considered a contractor it must have "incurred a contractual obligation to a third party, a part of which obligation the [contractor] has delegated or sublet to a subcontractor whose employee is injured." *Miami Herald Publ'g v. Hatch,* 617 So.2d 380, 381 (Fla. 1st DCA 1993). *See also Roberts v. Gator Freightways, Inc.,* 538 So.2d 55, 57 (Fla. 1st DCA) (to be considered a contractor, the "*primary* obligation in performing a job or providing a service must arise out of a contract"), *approved,* 550 So.2d 1117 (Fla.1989).

The evidence discloses that Hercules had contracted with St. Joe to remove pine stumps from real property owned by St. Joe. Thereafter, Hercules contracted with Swilley, delegating to Swilley its right to remove the stumps and to haul them to the Hercules plant where resin was extracted. The resin was then sold to third parties for making numerous products, including

adhesive sealants, chewing gum, toothpaste, citrus drinks, and cleaning materials.

In denying the claim, the JCC found that Hercules could not be considered a "contractor" under the statute, in that it was not performing a job or providing a service arising out of a contract. The pertinent findings of the JCC in this regard are as follows:

> [T]hey [Hercules] paid St. Joe for the right to remove stumps.... Hercules was not performing a job nor providing a service arising out of a contract.... Hercules produces a finished product to wit: Resin. They manufacture resin. There is no obligation to any third party. Further, the agreement between Hercules and St. Joe is not to clear and/or remove stumps. Only a right to remove is granted and Hercules pays for the right. There is no actual obligation to remove any stumps. Therefore, claimant is not a statutory employee of Hercules.

We assume from the above language that the JCC considered there was no mutuality of obligation between Hercules and St. Joe, because the contract conferred on Hercules only the right to remove stumps from St. Joe's property, and nothing was stated therein requiring their removal, or when, during the term specified, they should be extracted. The JCC apparently decided that the contract was in the nature of an executory contract, in that it depended on a future performance or event, *i.e.,* the exercise of Hercules' right to remove. The rule is well settled that a contract which is not mutually enforceable is considered an illusory contract. *See Pan–Am Tobacco Corp. v. Department of Corrections,* 471 So.2d 4, 5 (Fla.1984); *Etheredge v. Barkley,* 25 Fla. 814, 6 So. 861 (1889).

What the JCC failed to realize, however, is that the contract's provisions obligated St. Joe to supply all of Hercules' requirements for the use of stump wood during the term designated. Where a contract is for a specified time and obligates the purchaser to buy all that he or she needs from the vendor, it is held that the purchaser's obligation to buy to the extent of his or her requirements supplies mutuality. *See Jenkins v. City Ice & Fuel Co.,* 118 Fla. 795, 160 So. 215 (1935). And it is immaterial to the issue of mutuality of obligation that the right to buy is at the purchaser's option or discretion. *Id.*

The above rule has been codified in Florida's Uniform Commercial Code as follows:

> A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

FLA. STAT. § 672.306(2) (1991). Such contracts are not deemed to be indefinite or lacking in "mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure." 19A FLA. STAT. ANN. 222 Uniform Commercial Code cmt. 2 (1993).

In its renewal contract with St. Joe, Hercules agreed, during the term from June 1, 1992, through May 31, 1993, [footnote omitted] to pay the latter a specified sum for each ton of stump wood delivered to Hercules' plant. St. Joe in turn agreed to sell to Hercules "all of the original growth dead pine top wood and stumps ... suitable and acceptable for processing by Hercules," located on lands St. Joe owned during the term of the agreement. This contract was but one of a series of harvesting contracts between the parties, dating back to 1983. In order to carry out the terms of the sale, St. Joe granted to Hercules the right to come onto its property and harvest all such suitable stumps. Hercules thereafter entered into a harvesting contract with Swilley, delegating to it its right to remove dead stumps from St. Joe's land, and promising to pay Swilley a specified amount for each ton delivered to its processing plant in Brunswick, Georgia. Given the terms of the parties' agreements, the contract with St. Joe should be understood as obligating Hercules to buy stump wood to the extent of its requirements or needs, which, as such, supplies the essential element of mutuality and is binding.

Even if the contract in issue could not be considered a binding requirements or needs contract at the time of its inception, the courts generally recognize that if the buyer thereafter orders shipment of specific amounts of the commodity contracted for, the buyer is bound to the extent of the quantity ordered. O.S. Tellier, Annotation*, Mutuality and Enforceability of Contract to Furnish Another with His Needs, Wants, Desires, Requirements and the Like, of Certain Commodities,* 26 A.L.R..2d 1139, 1149–1151 (1952). In the case at bar, the JCC apparently overlooked the fact that at the time of claimant's injury, a number of stumps had already been removed and loaded on the truck that claimant operated. Clearly, at such time, St. Joe could have enforced the terms of the agreement by demanding payment for the quantity of the stumps then actually taken.

* * *

For all of the above reasons, we are of the firm opinion that the JCC erred in holding that Hercules was not performing a job or service arising out of the contract. The contract clearly contemplated that Hercules or its delegate could remove pine stumps from St. Joe's property to the extent necessary to satisfy Hercules' needs. Accordingly, there is no competent, substantial evidence to support the JCC's finding that Hercules was not under a

contractual obligation to any third party. The evidence submitted leads to the ineluctable conclusion that the contractor, Hercules, sublet part of its express contract work to a subcontractor, Swilley. Under the circumstances, all of the employees of Swilley engaged in such work must be deemed to be employed in the same business or establishment as that of Hercules. § 440.10(1)(b).

REVERSED and REMANDED.

Note

Being familiar with the concept that the duty to act in good faith for a somewhat-less-than-exact quantity nevertheless fulfills the consideration requirement, it should be clear from the language of the U.C.C. provision itself (as reproduced and enacted by the Florida Legislature).

> **672.306 Output, requirements, and exclusive dealings.—**
>
> (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
>
> (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 5

11. The need for a swap of values as consideration, possible exceptions or special cases to this need, and what does and does not qualify
12. The distinction between legal sufficiency and adequacy, and when to use either
13. The developing understanding of intersections between contract law other law such as the law of property (personal and real), tax law, etc.
14. The concepts of output, requirements and exclusive dealings contracts and how they avoid the problem of “lack of consideration”

SUGGESTED EXERCISE(S)

11. Create an exercise that uses FLA. STAT. § 672.306 (2017) and then cross-referencing and the definitional cross references. Quiz students and see if they know the definitions. Then follow-up with them working in groups to clarify any misunderstandings about the differences between output, requirements, and exclusive dealings contracts.

12. Create an exercise that has students write separate hypotheticals for when there is/is not bargained-for exchange, forbearance, etc. Have them get into groups and debate with colleagues.

Chapter 6: THINGS THAT ARE NOT CONSIDERATION

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Chapter V was devoted to things that constitute consideration and the tests or requirements to satisfy the consideration element. The fact that requirements or qualifications exist for something to constitute consideration implies that there must be other things that, despite pleas to the contrary, do not. History and case precedent have shown that there are at least several main categories of situations where something is probably not consideration despite argument to the contrary. The list of categories of things that do not constitute consideration is large enough to merit its own Chapter in this casebook.

This is an appropriate time to point out yet another difficulty of mastering contract law until such time as someone has an integrated understanding. One must be led to the knowledge of contract law in a significantly chronological fashion, but a master's logic (and argumentation) may be best manifested following a different organization or timeline. Ask yourself, as a seasoned practitioner, is it better to spend time and effort arguing the consideration elements and then turn to the question whether something falls into the category of non-consideration? Or does it make sense to try first to see if something falls into one of the non-consideration categories, and therefore to dispel with that issue up front if possible? And only then turn to the requirements of consideration (sufficiency, and possibly adequacy) if the thing at issue does not qualify as an exception to consideration? The law is taught the other way around to provide the necessary context and definitions, but a contracts master would avoid the initial consideration questions where the thing being considered falls into a category of exceptions. Hopefully, readers can see why it is necessary to address consideration in Chapter V and exceptions in Chapter VI, but also why practitioners would probably focus on the issue in reverse order. With apologies, students taking law exams are well advised to explain briefly all of this in order to show points-worthy comprehension.

An example may prove helpful. Assume that a fact pattern involves a purported consideration that may be illusory (which is addressed below). For example:

> Issue: Does the buyer's promise constitute consideration, which is a necessary element of contract formation?
>
> Rule(s):
>
> Consideration is a legal requirement of formation, which is a *quid pro quo* that …
>
> Legal sufficiency is …., and if satisfied, there is no need to go into the adequacy question …
>
> There is a group of things that the law has often found NOT to be consideration, including …
>
> Analysis: (to be determined by the fact pattern…)

Contrast this to a correct answer, but one worth fewer points on a law school exam (though it may be proper in a court document, to save time and client expense):

Issue: Is the buyer’s promise illusory so that it does not meet the formation element of consideration?

Rule: Illusory promises usually are not consideration unless…

Analysis: (to be determined by the fact pattern…)

While practitioners will quickly understand the reason for these differences and know what is best for their client, law students and those taking a bar exam are advised to take the lesson being shared here to heart. Which would a court expect? Which would a law professor or bar-exam grader expect? Are they the same? When someone is being assessed on how much is substantively known and how he or she reached a conclusion?

1. Illusory Promise

PICK KWIK FOOD STORES, INC. v. TENSER

District Court of Appeals of Florida, Second District, 1981

407 So. 2d 216

DANAHY, Judge.

A contract entered into by the parties' respective predecessors in interest is the subject of this lawsuit. The trial judge ruled as a matter of law that appellant was bound by the contract and guilty of breaching it, and a jury awarded appellee the sum of $100,000 in damages for the breach. We reverse.

The original parties to the contract were In & Out Food Stores, Inc., and Petrol Express. In & Out Food Stores leased premises on which it operated a convenience store and the contract gave Petrol Express the right to conduct retail sales of gasoline on the premises. To that end, the contract allowed Petrol Express to install the necessary equipment and machinery for dispensing gasoline at retail, which Petrol Express agreed to do, and prohibited In & Out Food Stores from selling or permitting the sale of any gasoline products other than those provided by Petrol Express. In & Out Food Stores agreed to collect all proceeds from the sale of gasoline and deposit the same in an account in the name of Petrol Express. Net profits were to be divided equally between the parties. Petrol Express commenced a retail sales of gasoline business at the In & Out Food Stores' location pursuant to this arrangement, and it proved to be profitable.

Appellant acquired In & Out Food Stores' leasehold interest and convenience store business several years later. In the meantime, appellee required the rights of Petrol Express under the contract. Following appellant's acquisition

of the convenience store, appellee continued to operate the retail gas business at that location. Some thirty months later appellant informed appellee that it did not consider itself bound by the contract and terminated its relationship with appellee. For that alleged breach of contract, the jury awarded appellee an amount representing lost profits plus attorney's fees, the latter being provided in the contract to the party required to bring legal proceedings for its enforcement.

Appellant's first line of defense is that it did not assume or acquire the burden of any obligation under the contract, as a matter of law, by reason of its purchase of In & Out Food Stores' leasehold interest. We need not reach that question because we conclude that the executory features of the contract were void from the beginning for lack of consideration or, as the rule is sometimes expressed, for lack of mutuality.

The contract expressly grants appellee, as successor in interest to Petrol Express, the unrestricted right to remove his equipment and machinery from appellant's premises and terminate the contract at any time. A bilateral contract terminable at the will of one party is not binding, and may be terminated by either party without liability for payment of damages representing lost profits anticipated by the other. This rule is sometimes expressed as the requirement that there must be mutuality of obligation with respect to contracts to be performed in the future.[1] A binding contract requires consideration. In a bilateral contract, the promise of one party constitutes the sole consideration for the promise of the other. If one party has the unrestricted right to terminate the contract at any time, that party makes no promise at all and there is not sufficient consideration for the promise of the other. *E. I. Du Pont De Nemours & Co. v. Claiborne-Reno Co.*, 64 F.2d 224 (8th Cir. 1933); *Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 F. 693* (5th Cir. 1924*); Jacob Schmidt Brewing Co. v. Minot Beverage* Co., 93 F.Supp. 994 (D.N.D.1950); *Allington Towers North, Inc. v. Rubin*, 400 So.2d 86, (Fla. 4th DCA 1981); I Williston on Contracts (3d Ed.) § 104 at 401.

Other than to install equipment, maintain it in good repair, and carry liability insurance while the equipment remained on appellant's premises, appellee had no express or implied commitment under the contract to do anything. He could remove the equipment at any time. Therefore, appellant was not committed under the contract and was entitled to terminate appellee's gasoline sales business on appellant's premises. Since appellant is not liable to appellee for damages representing future lost profits, the judgment in appellee's favor is erroneous.

REVERSED and REMANDED with directions to enter judgment for appellant.

GRIMES, A.C.J., and CAMPBELL, J., concur.

---

1 Mutuality of obligation is a concept separate and distinct from the equitable doctrine requiring mutuality of remedy. In equity, lack of mutuality means that equity will not give specific performance to a contract unless there is mutuality in the sense that the plaintiff's promise, so far as it is still unperformed, is capable of equitable enforcement. 1 Williston on Contracts, 3d ed., § 105A at 423. Appellee correctly points out that in *Thompson v. Shell Petroleum Cor*p., 130 Fla. 652, 178 So. 413 (1938), a lessee's option to terminate a lease was held not destructive of "mutuality" so as to preclude the lessee from obtaining injunctive relief against the lessor. However, "mutuality" in that case referred to mutuality of remedy, not mutuality of obligation. Unlike the instant case, the lessee's right to terminate did not destroy the mutuality of obligation in the lease agreement, and lack of consideration was not an issue. Appellee's reliance on the Thompson case, therefore, is misplaced.

Notes

11. What is it that causes a purported promise to fail as illusory? What is one of the parties to a contract trying to do? What happens if there are more than one alternative promise on one side of the equation? Resort to the Restatements is instructive.

    Restatement (Second) Contracts § 77 Illusory and Alternative Promises

    A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

    (15) each of the alternative performances would have been consideration if it alone had been bargained for; or

    (16) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

12. As footnote 1 of the *Kwik Pick Food Stores, Inc.* case makes clear, there are at least two distinct categories of mutuality. One is an "element #3 – consideration" question, and the other is an "element #4 – sufficient specificity of essential terms" question, the latter of which is addressed in Chapter 7. Are you able to explain when to address the first and when to address the second? Or at least to set out a few facts that implicate one or the other mutuality question? This is another small but important distinction that is potentially confusing due to similarity of terminology.

13. Contracts cases can be quite complicated and may involve torts as well as contracts issues, property issues, etc., in addition to the civil procedure and evidentiary rules that are always a part of any court case. Argument in the alternative is not uncommon. For a hefty federal case that addresses an illusory promise, along with quite a few other issues, *see Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290 (Fed. Cir. 11th 1998). *See id.,* footnote 51 and accompanying text (indicating that Florida courts follow this rule on illusory promises and pointing out a potentially confusing use of terminology – the implication of which is to request Florida courts to use terminology more clearly in future cases).

14. After reading the Restatement (Second) Contracts § 77(b) above, can you think of another factual situation where alternative promises with at least one illusory promise would be (or should be) binding? Is this answered by Section (c) in the Commentary to that rule? On a side note, do you ever wonder where professors find material for true-and-false and multiple-choice questions? Could they craft these from the examples in the Comments to the provisions in the Restatement (Second) Contracts? If so, would this not be another resource for study?

2. Pre-Existing Legal Duty

Whereas the previous category involves one party to an agreement trying to avoid being bound while the other one is, this category involves a duty that a party is already under. Accordingly, the assertion of the pre-existing duty as sufficient consideration for some new or extra return would fail.

A. The Finding of a Pre-Existing Legal Duty

CITY OF MIAMI BEACH v. FRYD CONSTR. CO.

District Court of Appeals of Florida, Third District, 1972

264 So. 2d 13

HENDRY, Judge.

Appellant-defendant City of Miami Beach seeks review of a judgment for money damages in the amount of $2,666.45, plus 6% Interest, entered in a nonjury trial. Appellee-plaintiff Fryd Construction Corporation sued for breach

of a construction contract. The dispute concerns whether installation of eight rows of aluminum seating was an ‘extra’ or was a contract item.

In March, 1969, the parties entered into a building contract for the construction of a concrete grandstand in Flamingo Park. In the contract detailed construction matters were set forth.

In May, 1969, the appellee wrote the city that the specifications for the project called for only one row of aluminum seating, and if the city desired additional rows of aluminum seating, the cost would be $2,666.45. The city replied that the contract called for installation of full capacity aluminum seating, so that there should be no further cost to the city. By an agreement reached during May and June, 1969, all the aluminum seats were installed, but without prejudice to the rights of either party and without prejudice to either party bringing legal action.

In November, 1969, a proposed contract change order number eight was prepared by the Public Works Department to the effect that the city's plans did not describe fully the extent of the aluminum seating to be furnished. The proposed contract change order noted that the legal opinion at that time was that the prior city's position was legally indefensible.

The appellee has characterized this document as an admission against interest. At oral agreement the appellee did not treat it as an amendment to the contract supported by consideration. The parties state that the seats had already been installed pursuant to the May—June, 1969 agreement by November.

At the non-jury trial, expert witnesses testified as to their interpretation of the original written contract, particularly as respects the specifications which it contained. A clause was § 10.19(G):

> ‘G. With respect to any parts of the work for which only a portion is completely drawn, detailed or specified, or which are indicated on the Plans for any particular area or location, all like work shall conform to the portion so drawn or detailed and shall be deemed to continue throughout like areas or locations unless distinctly shown or noted otherwise.’

The trial court awarded appellee full damages, plus legal interest.

The city urges that the proposed change order is not supported by consideration because of the familiar rules that performance of a pre-existing duty is not legal consideration and that past consideration is not legal consideration. It further argues that the public works department lacked the authority to make this type of change. It urges that the proper authority was

the city engineer, who did not sign the proposed contract change order number eight. It even suggests, which suggestion the city admits is tenuous, that the city manager or council be required to approve or ratify this document. The provision reads:

> '4.3 Alteration of Plans or of Character of Work—The right is reserved for the Engineer to make from time to time such alterations in the Plans or in the character of the work as may be considered necessary or desirable to complete fully and perfectly the proposed construction and such alterations shall not be considered as a waiver of any conditions of the contract, nor to invalidate any of the provisions thereof. Should such alterations in the Plans result in an increase or decrease of the quantity of work to be performed, and should added or eliminated work be of the same character as that shown on the original plans, the Contractor shall accept payment in full at the Contract Unit Price for the actual quantities of the work done. Should an alteration be a change in the character of the work, an equitable sum to be agreed upon, in writing by the Contractor and the Engineer before such work is begun, shall be added to or deducted from the Contract Price, as the case may be. No allowance will be made for anticipated profits.'

'If A is bound by a contract with B to erect a building or deliver goods or render any other performance at an agreed price, it is generally held that his performance of that duty is not a sufficient consideration for a new promise of B to pay an increased compensation or to do anything in addition to payment of the price as originally agreed.' 7 Corbin, Contracts § 175, p. 123 (1963). While the general rule has been criticized and exceptions created, one justification for its continued existence is that a contractor may purposely submit a low bid in order to secure the contract, but then refuse to perform, after it is too late to obtain another contractor without loss or inconvenience, in order to induce a promise to pay more. 7 Corbin, Contracts § 171, pp. 105-106 (1963). Where public contracts are involved this justification for the continued adherence to the pre-existing duty rule acquires an added dimension because public officials and public coffers are intimately connected with these projects. We do not hesitate to add that in the instant case the record reveals only a good faith effort to reach an amicable settlement to a good faith dispute as to the interpretation of contract specifications.

In presenting its argument, the city maintains that the construction company seeks compensation for an item as an 'extra,' but the item was originally called for in the contract. The city contends that it adhered to its original position that the specifications called for all rows to have aluminum seating. Therefore, it would have this court conclude that the pre-existing duty rule would preclude establishment of an executory accord, an accord and

satisfaction or a substituted contract. We express the view that such a conclusion should be drawn. The city also appears to argue that the dispute did not involve an unliquidated claim as to which the validity was actually in doubt, so that the contract could not be discharged through the legal vehicles of an executory accord, accord and satisfaction or a substituted contract. As we have said, the contractor did base his claim on a good faith dispute, and therefore we reject this argument by the city.

We further agree with the contentions of the city that the contract specified that contract changes would be authorized by the city engineer. The city engineer signed the seven earlier proposed contract changes, but did not sign proposed contract change number eight, as called for in the contract.

Therefore, the judgment appealed is reversed and remanded with directions to enter a judgment for the defendant city.

Reversed and remanded with directions.

Note

Where casebook authors include two cases under one outline heading, there is usually a reason. Perhaps there are two or more approaches worth considering (e.g., “old school” vs. “new school” reasoning). There may even be some vital, secondary or tertiary pointer the likes of which are not often highlighted but students are expected to glean it before taking a bar exam.

MARTINEZ v. SOUTH BAYSHORE TOWER, L.L.L.P..

District Court of Appeals of Florida, Third District, 2008

979 So. 2d 1023

PER CURIAM.

Appellants (“Purchasers”) seek reversal of an adverse summary judgment in favor of South Bayshore Tower, L.L.L.P.. (“the Developer”). Based upon accord and satisfaction, we affirm.

The Developer and the Purchasers entered into pre-construction condominium contracts and the Purchasers gave the Developer a ten percent deposit of the total purchase price. Thereafter, the Developer abandoned the project. The

Developer returned the Purchasers' deposits with a letter stating that cashing the check would serve as an accord and satisfaction, terminating the parties' rights and obligations under the contract. All of the Purchasers cashed their checks.

The Purchasers contend that there was no intent to settle an existing dispute and thus, no accord and satisfaction. The Developer asserts that there was an accord and satisfaction because the Purchasers relieved the parties of all rights and obligations under the contract by cashing their returned deposit checks. We agree with the Developer.

An accord and satisfaction results when: (1) the parties mutually intend to effect a settlement of an existing dispute by entering into a superseding agreement; and (2) there is actual performance in accordance with the new agreement. Compliance with the new agreement discharges the prior obligations. *Rudick v. Rudick*, 403 So.2d 1091, 1094 (Fla. 3d DCA 1981).

Here, cashing the checks satisfied the elements of accord and satisfaction. It showed that the Purchasers intended to effectuate a settlement of the dispute and also constituted actual performance of the new agreement.

Additionally, if an offer clearly serves as an accord and satisfaction, and the other party accepts the offer, then he or she is bound to the conditions attached. *McGehee v. Mata*, 330 So.2d 248 (Fla. 3d DCA 1976). Had the Purchasers intended the Developer to remain obligated under the contract, then they should not have cashed their checks.

Further, strong public policy supports the use of accord and satisfaction. Accord and satisfaction is a convenient and valuable tool for resolving disputes informally without litigation. *Burke Co. v. Hilton Dev. Co.*, 802 F.Supp. 434 (N.D.Fla.1992). It would be unjust to allow a party to accept a check as an accord and satisfaction, and then later permit that party to sue under the same rights and obligations that the accord and satisfaction was intended to release. The person cannot “have his cake and eat it too.” 802 F.Supp. at 439.

Accordingly, we affirm the final summary judgment.

Affirmed.

Note

There is an important issue in consideration law known as *accord and satisfaction* that is involved in the both the *City of Miami* and the *Martinez* cases. Simply put, an offer to settle a contracts dispute for a sum less than

expected by the other party to the contract may be, if accepted, full consideration for the offeror's obligation(s) – thereby precluding arguments by the other party for further payment or action.

It should be noted that public policy favors settlement of disputes, which saves time, litigation costs, and judicial resources. However, there may be cases where damages are liquidated (clearly established), and partial payment would not necessarily erase the full obligation unless the agreement by the owed party to 'forgive' the remainder is supported by its own consideration. For example, a promise by the debtor or obligor, for the partial forgiveness, to throw in something extra such as tickets to a sporting event. *See, e.g.*, *Chicago, Milwaukee, & St. Paul R.R. Co. v. Clark*, 20 S.Ct 924 (1900). Look for good faith that the sum is disputable and that the payment (or service) being offered to settle the dispute is justified to avoid litigation. As a brief exercise, it may be helpful to put this through the test(s) of consideration from Chapter v. First, are promises not to pursue legal action, or to pay a lower sum quickly rather than await the conclusion of litigation, over a disputed sum legally sufficient for a return promise not to sue for amounts that may still be owed? (This would be a bi-lateral agreement). Absent any special facts, is there any reason to doubt the honesty of either side to this transaction, which if such existed might call for assessment of adequacy? Giving up the chance to assert a good faith claim for lowered payment could be valid consideration, and the giving up further litigation and getting paid (at least partially) right away could also be valid consideration.

National casebooks sometimes include cases such as *Clark v. Elza*, 286 Md. 208, 406 A.2d 922 (1979), which distinguishes between situations of accord and satisfaction on the one hand, and executory agreements (*see* Chapter V) on the other. This distinction was mentioned briefly in the *City of Miami* case above. Suffice it to say at this juncture that a party offering partial payment for a disputed amount must actually pay it before the paying party would have the right to claim that the settlement amount (presumably lower than what the other party may be entitled to) is binding.

B. Finding That There was no Pre-Existing Legal Duty

ASHBY v. ASHBY

District Court of Appeals of Florida, Fourth District, 1995

651 So.2d 246

STEVENSON, Judge.

This is an appeal from a final order of summary judgment where the trial court found that there was no valid consideration for an agreement entitling

appellant, Grace Ashby, to $25,000 from her former husband's estate. Both appellant and the deceased's estate moved for summary judgment in the trial court below and maintained in this appeal that the issue should be decided, one way or the other, as a matter of law. Because we find that, as a matter of law, the agreement was supported by valid consideration, we reverse.

The facts can be briefly summarized. Appellant and the deceased, Kenneth Ashby, entered into a property settlement agreement in contemplation of their impending divorce. The settlement agreement provided that the deceased was to pay appellant $250,000 “tax free,” secured by a mortgage deed. In return, appellant agreed to release the deceased from any other obligations that might flow from the divorce.

Subsequently, the deceased paid the $250,000 to appellant and sought a satisfaction of the mortgage. Appellant, however, was unconvinced that there would be no income taxes due on the $250,000. She escrowed a conditional satisfaction of the mortgage which required the deceased to either (a) prove that there were no income taxes due on the $250,000 or (b) pay the taxes if they were due. The deceased consulted with a certified public accountant but the accountant was unable to verify that no income taxes would be due. The parties then entered into a new agreement whereby the deceased agreed to leave appellant $25,000 in his will. As security, he provided a conditional collateral promissory note collectible from his estate after his death if he failed to make the $25,000 bequest. In return, appellant agreed to unconditionally release the satisfaction, thereby clearing the lien on the property. The $25,000 promissory note is at issue in the instant appeal.[17]

The estate bases its argument that there was no consideration for the $25,000 promissory note on the legal principle that performance of a pre-existing duty does not amount to consideration necessary to support a new contract. While we agree with the estate's statement of the law, we find the principle inapplicable to this case. The estate overlooks the fact that appellant was not required to perform her part of the contract-satisfaction of the mortgage-until the deceased performed his-the payment of $250,000 “tax free.” Because the deceased did not show that he had fully performed his obligations under the contract, appellant was not obligated to tender her full performance. Therefore, appellant's subsequent agreement to release the satisfaction of the mortgage constituted ample consideration for the $25,000 promissory note.

It is axiomatic that a promise, no matter how slight, can constitute sufficient consideration so long as a party agrees to do something that they are not bound to do. Bayshore Royal Co. v. Doran Jason Co. of Tampa, Inc., 480 So.2d 651 (Fla. 2d DCA 1985). The deceased never established that he had satisfied his part of the original bargain so as to trigger appellant's obligation to provide an unconditional satisfaction. See Seaside Community Dev. Corp. v.

[17]

Edwards, 573 So.2d 142, 145 (Fla. 1st DCA 1991) (“When the happening of a condition precedent is an element of a contract, no recovery can be had with regard to performance of the contract absent substantial compliance with the condition precedent.”). We find that the consideration supporting the deceased's execution of the promissory note consisted of appellant's unconditional satisfaction of the mortgage.

Accordingly, the judgment is reversed and the case remanded with directions that the trial court enter summary judgment in favor of appellant.

REVERSED AND REMANDED.

FARMER and KLEIN, JJ., concur.

Note

We see from the last case that a renewed promise to perform something that a party is already legally obligated to perform may not constitute valid consideration. On a side note, readers may have noticed that while there was a formation problem in these cases, there was still a contract. What failed was that part of a *new* undertaking, usually in the form of an attempted modification of that thing that a party was already obligated to undertake. And yet we know that deals change all of the time and they do not all suffer from a lack of consideration. The reason is that modifications can (and should) be supported by new consideration at common law. The next two simple problems should demonstrate this point.

Problem 6-1

Homeowner and Contractor contracted for Contractor to build a wooden deck in back of Homeowner’s house to be completed before July 1 of that year. A week before July 1, Contractor informs Homeowner that he would not be able to finish unless he were paid $1,000 more, which he would use to hire more workers. Homeowner agreed over the phone. After completion, Homeowner paid the original contract amount. Should contractor lose the extra $1,000 because he had a pre-existing legal duty to finish the deck on time?

Problem 6-2

Homeowner and Contractor contracted for Contractor to build a wooden deck in back of Homeowner’s house to be completed before July 1 of that year. A week before July 1, Contractor informs Homeowner that he would not be able to finish unless he were paid $1,000 more, which he would use to hire more workers. Homeowner agreed over the phone, and Contractor replied “Great!

We'll be able to round off the wooden edges rather than leave them square since I'll have the extra workers, at no further charge." After completion, Homeowner paid the original contract amount. Should contractor win the extra $1,000 because the extra work (the rounding off activity) is valid extra consideration for Homeowner's agreement to pay an extra $1,000?

Notes

13. Those who want to know whether there is any difference for modifications under U.C.C. Article 2 law are directed to read U.C.C. § 2-209(1) (or in Florida, FLA. STAT. § 672.209(1) (2017)).

14. A *novation* is the substitution of a new contract (or set of contracts) for a prior one (or a set of prior ones). While a modification adds something new to an existing agreement, a novation breaks up a prior agreement and substitutes a new one in its place. Novations are particularly important to other areas of contract law, such as in the case of *third-party-beneficiary* law (Chapter XXI) and *assignment-and-delegation* law (Chapter XXII).

Problem 6-3

Homeowner wrote asking Painter to paint his home by the end of summer for $5,000 and Painter wrote back stating that she accepted the work and would begin in a few weeks. A hurricane blew in, and clean-up took longer than expected such that neither Homeowner nor Painter were particularly interested in having the painting done in the current year. In March of the following year, Homeowner renewed the offer. Painter wrote back stating that she had started a new company with a few partners and that a new agreement would need to be worked out. What should Homeowner and Painter do for the painting project to ensue in the current year? If Painter did not have a new company with partners, but she required a higher price and the special condition of unrestricted use of Homeowner's garage to store her van and equipment, must the parties enter into a novation, or is there another way?

3. Past Consideration

GOLLOBITH v. FERRELL

District Court of Appeals of Florida, Second District, 2012

84 So. 3d 1095

NORTHCUTT, Judge.

Stephanie Ferrell moved to enforce an alleged settlement agreement under which Ed Gollobith's action against her was to be dismissed. The circuit court granted the motion and dismissed Gollobith's suit. We reverse because the court ruled without first hearing evidence to resolve disputed issues regarding the existence and terms of the agreement.

The litigation arose from Gollobith's contract with Ferrell, an architect, for the design of a house. Gollobith entered into a separate contract with a general contractor for the construction. He later sued Ferrell, the contractor, and others involved in the project. Gollobith settled with the contractor after several days of arbitration. Ferrell was not a party to the arbitration, but she assisted Gollobith during the arbitration hearing. After the arbitration, Gollobith's attorney advised Ferrell that Gollobith had agreed to drop the claim against her. When Gollobith later moved to set this claim for trial, Ferrell filed a motion to enforce the alleged settlement.

In her verified motion, Ferrell recounted that she assisted Gollobith with the arbitration, at no cost, and that Gollobith's attorney had encouraged her to fully cooperate “as consideration for the dismissal, which the attorney would recommend.” Ferrell said that after the arbitration, Gollobith's attorney told her by telephone and by e-mail that Gollobith had agreed to drop the suit.

At a brief nonevidentiary hearing on Ferrell's motion to enforce settlement, Gollobith's attorney acknowledged that he telephoned Ferrell when the arbitration was over and that he told Ferrell his client had “agreed to dismiss you; but what happened is in the coming weeks and even months maybe, [Gollobith] changed his mind.” In opposition to the motion to enforce settlement, Gollobith's attorney argued in part that there was no consideration for the promise to dismiss Ferrell and that her assistance with the arbitration was not part of a quid pro quo. He asked the court for an evidentiary hearing. But the court found that Ferrell's assistance with the arbitration was the consideration. Based on this finding, it granted the motion and dismissed with prejudice Gollobith's claim against Ferrell.

We agree with Gollobith's argument on appeal that the circuit court should have granted his request for an evidentiary hearing because the facts concerning the consideration necessary to support the purported settlement were in dispute. Whereas Ferrell claimed that she furnished assistance in exchange for a promise to dismiss the case against her, Gollobith maintained that no promise was made until after Ferrell provided assistance and that,

therefore, her assistance did not constitute legal consideration necessary for a binding contract.

It has been held that "[w]here the consideration in a contract is past, no valid and binding contract comes into existence." *Barnes v. Beaumont*, 70 So.2d 560, 563 (Fla.1954) (*quoting Pink v. Meyer*, 159 Misc. 542, 288 N.Y.S. 16, 17 (N.Y.Sup.Ct.1936)); see also *City of Miami Beach v. Fryd Constr. Corp.*, 264 So.2d 13, 14 (Fla. 3d DCA 1972) (reciting party's reliance on familiar rule that "past consideration is not legal consideration"). "Providing past services rendered without the expectation of compensation is not adequate consideration to support a contract." *Smith v. Locklear*, 906 So.2d 1273, 1274 (Fla. 5th DCA 2005) (affirming trial court's determination that purported agreement was unenforceable because it lacked consideration). Without consideration, a "promisor may change his mind at will." Id. (*quoting Brown v. Brown*, 501 So.2d 24, 27 (Fla. 5th DCA 1986)).

In this case, the circuit court could not properly conclude that the alleged settlement agreement was supported by legal consideration without taking evidence and resolving fact disputes. See Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd., 933 So.2d 732 (Fla. 2d DCA 2006) (requiring evidentiary hearing to decide disputed issue of fact regarding purported settlement agreement). Accordingly, we reverse and remand for an evidentiary
hearing.

Reversed.

CASANUEVA and KHOUZAM, JJ., Concur.

Note

On another note, the practice of law is often a multi-disciplinary, and it is usually a multi-issue, endeavor. One of the major challenges of law professors is to ensure sufficient knowledge in what are known as 'doctrinal' courses (such as this one), while still providing instruction an practical aspects (how it's really done, evidence, civil procedure) and pointers on ethics. Often this is handled by careful planning of a law school curriculum, with early doctrinal courses, later cross-disciplinary and practical courses, and an ethics course. A law school should ensure the development of practical skills as well, which might be handled in an upper-level clinic or externship experience. There is a major movement calling for the mixture of these skills either within a course or in concurrently running labs, clinics, etc. *See, e.g.* AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUC., DRAFT REPROT AND RECOMMENDATIONS (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_

responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf

Occasionally, casebook authors find a case that teaches on a multitude of levels which are particularly important to law students and recent graduates. Issues could include ethics, a bar's character and fitness requirements, student loan and bankruptcy law, and the laws on discharge of legal obligations. These include statutes of limitation (and statutes of repose) and discharge of legal obligations in bankruptcy, described in the section below. The next few cases explore moral obligations asserted to constitute legally valid consideration where the sought-after performance is not ordinarily enforceable.

Problem 6-4

Oscar contracted with Allen to build a treehouse on his property for Allen's children for $1,500. The contract called for Oscar to pay a deposit of $500 to Allen prior to the onset of construction, a $500 payment at the halfway point, and the remaining $500 upon completion of the project. When Allen finished constructing the treehouse, Oscar was completely unsatisfied with the quality of construction and refused to make the final $500 payment to Allen. However, instead of taking each other to court to fight over the contract price, the parties entered into a written settlement agreement that Oscar would pay Allen $200 and neither of the parties would bring a breach of contract suit against the other. If Allen was unsatisfied with the agreement after signing the contract and accepting the $200, would he be successful in bringing a court claim for the remaining $300? Would the same be true if Allen had promised to pay the $200 by the end of following the month, and has failed to do so even though time has moved the parties into the third month?

4. Moral Obligations

Moral obligations typically do not constitute consideration. The common textbook example is a promise based on a return promise of "love and affection" of the other party, often a spouse or other family member. The duty to love and show affection has been considered a moral obligation and therefore a promise to so act is often not enforceable. This is not to say that courts do not sometimes find creative ways around this problem when justice cries out for enforcement of a promise under certain facts and circumstances. *See, e.g., Davis v. Jacoby*, 34 P.2d 1026 (Cal. 1934). In *Davis*, an elderly person offered to give his niece (with whom he and his ailing wife had an excellent family relationship) the house if she and her husband moved to help him with his hospitalized wife and with his business affairs. The ailing wife died before the niece and her husband arrived, but the niece's husband had already wrapped up his own business affairs and he and his wife had taken

steps to move their domicile. (*As one would expect since the case made it to California's highest court*…), the offeror tried to rescind the offer. His argument was that it was a unilateral offer revocable until the niece and her husband finished performance. The California Supreme Court relied on the presumption that agreements are bilateral where they are not clearly unilateral – and ruled that the niece and her husband had made a return promise – which was valid consideration. Morally, the elderly person was obligated to honor his offer. By characterizing his offer as a bilateral one (though arguably it was unilateral), justice was served.

A. Love and Affection

HARROD v. SIMMONS[18]

District Court of Appeals of Florida, Second District, 1962

143 So. 2d 717

KANNER, Judge.

Love and affection was the consideration for certain properties purportedly conveyed to plaintiff, appellant here, by her father one year before his death. The suit against defendants-appellees, the other heirs-at-law, brothers and sisters of appellant, and against the administrator of the estate of the father sought reformation of the deed of conveyance so as to include in it a described piece of real property which appellant asserts was intended to be deeded to her but was mistakenly omitted. From order of the chancellor dismissing the amended complaint with prejudice, the appeal has been instituted.

Alleged in the amended complaint are the essential facts comprising the background of the dispute. Decedent, accompanied by appellant daughter, visited an attorney for the purpose of engaging him to prepare his last will and testament. The father informed the attorney that, although he had six children and six stepchildren, he wished to have all his property pass only to appellant daughter upon his death to compensate her for love and affection. Pursuant to advice of the attorney, decedent executed conveyance with reservation for life estate in himself. He also executed an affidavit stating that it was his intention to convey his properties to appellant to compensate her for love and affection shown him.

Appellant's argument on behalf of reformation is premised upon a sole appeal question. The problem which it advances is whether a court of equity, regardless of availability of written evidence of the grantor's intention, will refuse to reform a deed where a mistake was made in copying the description of the property intended to be conveyed because love and affection motivated

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the transfer by the grantor, although the grantor was deceased prior to the attempt at reformation.
Through the stated point appellant quotes and protests application in equity of the rule of law laid down in the case of *Triesback v. Tyler*, Fla.1911, 62 Fla. 580, 56 So. 947, cited by the chancellor as being preclusive of the reformation sought. The Supreme Court through that pronouncement said, 'The difficulty with the case arises upon the consideration supporting the deed, which appears to have been only love and affection. This consideration is sufficient to uphold a deed as written, but it seems that it will not alone support an equity in the grantee to reform the deed.'

Appellant points to the affidavit of the deceased as demonstrating his intention to convey the property in controversy, urging that the quoted rule should be limited in its application to suits for reformation brought during the lifetime of a grantor and a grantee and concluding that equity should intervene to reform the deed here so as to effectuate the true intent of the parties.

The court in *Triesback v. Tyler* considered and reversed a decree for reformation which had been entered for the plaintiff. The instrument involved had been executed by the mother of plaintiff and defendants two years prior to her death. Virtually parallel to the case at bar, the *Triesback* case concerns reformation after the death of the parent grantor. Lack of consideration other than love and affection was held by the court in that case to be fatal to a request for reformation. 'In this aspect,' commented the court, 'the deed is said to be voluntary, an act of bounty, entitling the donee to no more consideration than the other children of the donor, who are sought to be disinherited pro tanto.' Thus it is clear that the *Triesback* case, dealing with a request for reformation to correct a deed after the death of the grantor, is at odds with appellant's thesis that the quoted rule should be restricted to reformation suits brought during the lifetime of the parties to the instrument. *Triesback v. Tyler* is among the group of cases from various jurisdictions representing the weight of authority. See 69 A.L.R.. 427-428; 128 A.L.R.. 1301; also see *Williams v. Nettles*, Tex. Civ.App.1932, 56 S.W.2d 321.

Appellant urges that the affidavit referred to constitutes written proof of the grantor's intent. This, however, does not operate to take the case out of the rule, because, in any event, proof of intent, whether written or oral, is a basic and essential element for reformation. An important distinction in cases of the type here reviewed is the crucial prerequisite of valuable consideration as against that of love and affection. Although love and affection is sufficient to imbue with validity a deed as it is written, it is not girded with the strength to stand alone as support for an equity in the grantee to reform the deed. Instead, if a grantee is to be permitted to acquire through reformation that which would pass through inheritance to himself and to the other heirs in equal proportion, there should be a valuable consideration. See *Triesback v.*

Tyler, supra. The obstacle to the granting of reformation here, therefore, is the fallacy of appellant's theory that love and affection only is adequate consideration to authorize a court of equity to reform a deed and, in so doing, to divest the other heirs of their inheritance. It is thus stated in the *Triesback* opinion. 'In the absence of any fact or circumstance going to show a valuable consideration moving from the grantee to the grantor, we find the authorities abundantly support us in holding that the grantee has no equity to reform the deed to the disinherison of the other heirs of the grantor equally entitled to her bounty.' Unfortunately for appellant, the father did not during his lifetime make the correction sought.

In the amended complaint, we find no fact or circumstance to take this case out of the principle laid down in the Triesback case. The chancellor's order of dismissal was properly entered.

Affirmed.

B. Moral Obligation After Legal Discharge of Duty

FLORIDA BOARD OF BAR EXAMINERS Re: G.W.L.

Supreme Court of Florida, 1978

364 So. 2d 454

ENGLAND, Chief Justice, and OVERTON, Justice.

The petitioner, G. W. 50., applied for admission to The Florida Bar and received a passing score on the bar examination. The Florida Board of Bar Examiners, acting as our agent for the admission process,[1] undertook an investigation into his character, fitness, and general qualifications to practice law in the state.[2] The Board refused to recommend G. W. 50. for admission to the Bar, and he now petitions this Court for admission. We allowed argument because this petition raises a matter of general importance in the admission process, specifically the effect of a bankruptcy petition on a Bar applicant's fitness to practice law. We agree with the recommendation of the Board and decline to admit the petitioner on the facts and circumstances in the record in this case, but this affirmance is without prejudice and the petitioner may seek a further hearing to offer additional evidence of his present good moral character.

To understand the ramifications of our decision today, it is necessary to recount the events surrounding the petitioner's discharge in bankruptcy. In doing so, it must be with the recognition that it is not the act of filing for bankruptcy but the circumstances surrounding this particular bankruptcy

application that demonstrate a lack of good moral character and justify the Board's decision.

G. W. 50. completed his secondary education in the northeast and attended an eastern university from September, 1969, until June, 1973. During that period he received approximately $1,900 in 3½% Interest student loans from the university, which amount was to be repaid within ten years after the termination of his status as a full-time student. In September, 1973, the petitioner entered law school. To finance his legal education, he borrowed approximately $2,500 per year from a bank under a government-sponsored 7% Interest student loan program. Similar ten-year repayment terms were agreed upon. When he received his Juris Doctor degree in May, 1976, G. W. 50.‘s financial obligations totaled $9,893. Initial payments were scheduled to begin nine months after graduation with the bulk of the payments not due for three years. There were no exceptional financial problems or identified misfortunes, and the obligations appeared normal for any student attending undergraduate and graduate educational programs on student loans.

For some months prior to his graduation, G. W. 50. attempted unsuccessfully to find legal employment locally. On May 19, 1976, he simultaneously filed with the Board a late student registration and an application to take the bar examination in Florida.[3] He also arranged several job interviews in southwest Florida where his parents reside. His initial efforts to secure employment in Florida, however, proved fruitless. On May 20, 1976, three days prior to his graduation from law school, the petitioner executed a voluntary petition for bankruptcy which he filed in the appropriate United States District Court on May 26, 1976. With the exception of one debt in the amount of $8.01, none of the debts listed in his petition were due at the time of filing.
In June, 1976, G. W. 50. concluded his personal participation in the bankruptcy proceedings and moved to Florida. He made informal arrangements with the court-appointed trustee to defer action on his petition for discharge for six months, allegedly with the understanding that if he could find a job and begin repaying his creditors he would voluntarily withdraw the bankruptcy petition. Nevertheless, the petition was granted on December 20, 1976, and by order of the bankruptcy court the petitioner was adjudged bankrupt and released from all his debts. Coincidentally, G. W. 50. secured employment as a law clerk in a law office in Florida on December 20, 1976, at a wage of $70 per week.

G. W. 50. passed the July, 1976, Florida bar examination and the customary background investigation was undertaken. During the course of the investigation, the Board discovered the bankruptcy petition and undertook a more extensive investigation of his activities in connection with that action. By letter of December 6, 1976, the Board notified the petitioner that it wished to inquire into the circumstances surrounding the filing of his voluntary petition for bankruptcy and requested that he appear before the Board in regard to

that matter. An informal hearing was held on January 14, 1977, at which G. W. 50. appeared, answered questions, and offered his explanation of the matter.

On January 19, the Board notified G. W. 50. that it had decided to defer final consideration of his application to permit further investigation. Immediately following the hearing G. W. 50. made arrangements for repayment of the debts discharged by the bankruptcy order of December 20, 1976. On February 20, specifications were drawn and served on the petitioner, advising him of the Board's intent to base its findings and conclusions on the testimony elicited at the informal hearing and informing him of his right to a formal hearing at which he would be entitled to be represented by counsel, to present evidence, to question witnesses, and, if necessary, to use the Board's subpoena power to secure the attendance of witnesses.[4] The petitioner responded to the specifications by letter dated March 8, 1977, in which he expressly declined a formal hearing and agreed to a determination of his application on the basis of facts then before the Board. The letter also advised the Board that he had secured employment as a law clerk and had voluntarily resurrected his discharged debts.

Within thirty days after receiving the letter, the Board recommended against petitioner's admission to the practice of law. After rejecting a request for reconsideration, the Board notified G. W. 50. of its action by letter dated September 14, 1977. On November 14, the petitioner filed his petition for admission with this Court. The Board submitted a response to the petition on December 16, 1977, and we heard arguments on the matter in chambers on February 6, 1978.

The critical inquiry in this case is whether the manner in which the petitioner voluntarily secured a discharge of his debts in bankruptcy justifies a finding of a lack of good moral character sufficient to make him unfit to practice law in Florida. The Board found that his activities proved him unfit to practice law, based on the following indicia:

(1) The petitioner had worked each summer during undergraduate school and two of the three summers during law school. At the time he prepared his bankruptcy petition, he had not fully tested the Florida job market either as to law-related employment or other jobs commensurate with skills he had earlier developed.

(2) The petitioner explained to the Board that his decision to consider practice in Florida was made after April, 1976, when his car broke down and was sold. This explanation was contradicted by evidence that he considered entering the practice of law in Florida at least as early as February, 1976, when he wrote to the Board for bar admission forms. His parents had lived in Florida for some years before that date.

(3) The petitioner suggested that his motivation for bankruptcy was in part pressure from creditors, particularly in the form of certain “dunning” letters that he allegedly received from bank lenders and from the newspaper with which he had advertised the sale of his car. His debt to the newspaper in the amount of $8.01 was incurred in April, 1976, one month before his bankruptcy petition was filed. The petitioner could not produce copies of the dunning correspondence to which he referred, indicating that he had destroyed those received from lending institutions. The Board found his claim of being driven to bankruptcy by “pressure” from his $8 one-month-old debt or his unmatured student loan obligations unbelievable.

The petitioner argues for admission essentially on two grounds, one legal and the other factual. First, he asserts that bankruptcy is a statutory right, available to all persons in this country not only for the benefit of the bankrupt but also for the benefit of the general public.[5] Therefore, he claims that a bar applicant's exercise of the statutory right cannot be said to reflect adversely on the character or fitness of the applicant. Second, he asserts that his decision to act before his significant debts became due was neither a fraud on his creditors nor otherwise morally reprehensible. Although the petitioner concedes that it would have demonstrated a lack of the requisite character and fitness to have contracted for the debts with the concurrent intention to file for bankruptcy and avoid their repayment, he argues that neither the Board's charges nor the record shows that he had any such preconceived intent.

The Board's position on the petitioner's admission application rests on the premise that while the filing of a petition in bankruptcy is lawful and does not of itself demonstrate a lack of fitness, conduct that is not unlawful may nevertheless fall short of the standards of moral character which must be met before one is qualified for admission to the bar. The Board recommends that this Court follow the view of the Oregon Supreme Court that: “Legality is beside the point. The issue is applicant's sense of ethics.” *Application of Alpert*, 269 Or. 508, 514, 525 P.2d 1042, 1045 (1974). It insists that its rejection of the petitioner's application was based on the circumstances surrounding his filing the bankruptcy petition rather than on the election to file itself. As factual support for its conclusion, the Board points out that the petitioner formed his intent to obtain a discharge before graduating from law school, long before the major debts were due, and apparently because (according to his testimony) he “found it an unfortunate but practical way of getting out of this awful situation of having no money and an awful lot of debts. . . .”

The Court, under its constitutional authority to “regulate the admission of persons to the practice of law,” has the authority to require proficiency in the law and good moral character before it admits an applicant to practice before the courts of this state. The sole purpose of these requirements is to protect

the public. The petitioner in the instant case had demonstrated his proficiency by passing the required bar examination. The issue before us is whether he has established his good moral character, taking into consideration the facts and circumstances under which he sought bankruptcy.[6]

The term "good moral character" has no absolute definition. *See Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 50.Ed.2d 810 (1957). One definition would require that only conduct or acts which historically constitute an act of moral turpitude justify a finding of a lack of good moral character. This Court in *State ex rel. Tullidge v. Hollingsworth*, 108 Fla. 607, 611, 146 So. 660, 661 (1933), defined moral turpitude as follows: "Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. . . ." Recently we expressed the view that issuing a worthless check without the intent to defraud was not an offense of moral turpitude but it was unethical conduct for a member of the bar. *The Florida Bar v. Davis*, 361 So.2d 159 (Fla.1978). Such conduct was the subject of bar discipline in the Davis case, and the lawyer was suspended for twelve months.

In our view, a finding of a lack of "good moral character" should not be restricted to those acts that reflect moral turpitude. A more appropriate definition of the phrase requires an inclusion of acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation. *See Konigsberg*, *supra*.

As we noted in *Florida Board of Bar Examiners Re Eimers*, 358 So.2d 7 (Fla.1978), the nature of the practice of law provides the unscrupulous attorney with frequent opportunities to defraud the client or obstruct the judicial process. It is our constitutional responsibility to protect the public by taking necessary action to ensure that the individuals who are admitted to practice law will be honest and fair and will not thwart the administration of justice. In our view, a definition of good moral character which limits an adverse finding to those acts which constitute an offense evincing moral turpitude is inadequate because, as we have held in bar disciplinary matters, it would not sufficiently protect the public interest. *The Florida Bar v. Davis, su*pra. The inquiry into good moral character which emphasizes honesty, fairness, and respect for the rights of others and for the laws of this state and nation is a proper and suitable standard for those who desire to be an integral part of the administration of justice in the courts of this state. We recognize, as we did in *Eimers, supra*, that the standard of conduct required of an applicant for admission to the bar must have a rational connection to the applicant's fitness to practice law, and the standard must be applied with that limitation in mind or the term "good moral character" could become "a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." *Florida Board of Bar Examiners Re Eimers*, 358 So.2d 7, 9

(Fla.1978) (*quoting Konigsberg v. State Bar of California*, 353 U.S. 252, 262-63, 77 S.Ct. 722, 728, 1 50.Ed.2d 810, 819 (1957)).

We must now determine two issues. First, are the facts in this case such that a reasonable man would have substantial doubts about the petitioner's honesty, fairness, and respect for the rights of others and for the laws of the state and nation? Second, is the conduct involved in this case rationally connected to the petitioner's fitness to practice law?

In our view, both questions must be answered in the affirmative. We find that the Board had ample record evidence from which it could conclude that the principal motive of the petitioner in filing his petition for bankruptcy was to defeat creditors who had substantially funded seven years of educational training.7 Whether that motive was present as the debts were incurred or was formed toward the end of his law school training, the Board could fairly conclude from the petitioner's own testimony and prior behavior that he exercised his legal right to be freed of debt by bankruptcy well before the first installments on his debt became due, with absolutely no regard for his moral responsibility to his creditors. The petitioner's admittedly legal but unjustifiably precipitous action, initiated before he had obtained the results of the July bar examination,[8] exhausted the job market, or given his creditors an opportunity to adjust repayment schedules, indicates a lack of the moral values upon which we have a right to insist for members of the legal profession in Florida. The petitioner's course of conduct in these personal affairs raises serious questions concerning the propriety of his being a counselor to others in their legal affairs, and is rationally connected to his fitness to practice law.

The fundamental purposes of the federal bankruptcy act are to facilitate the rehabilitation of the bankrupt debtor and to provide a means for equitable distribution of the bankruptcy assets among his or her creditors. At an early date in the history of the act, it was construed to “relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes.” *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 176, 49 50.Ed. 390, 394 (1904). Although the discharge bars the underlying legal remedy for collecting a debt, the underlying moral obligation to repay the debt remains and in fact constitutes sufficient consideration to make a subsequent reaffirmation legally enforceable. *Kesler v. Department of Public Safety*, 369 U.S. 153, 170, 82 S.Ct. 807, 817, 7 50.Ed.2d 641,
653 (1962); *Silva v. Robinson*, 115 Fla. 830, 156 So. 280 (1934).

The record before us reflects that the petitioner suffered no unusual misfortune or financial catastrophe prior to his filing the bankruptcy petition.

His position was no different than that of other students who used student loans to obtain and complete their education. Although he did not have employment at the time of his graduation and for six months thereafter, the student loans were not yet due and for the most part would not be due for at least a year. In our view, his filing of the bankruptcy petition showed a disregard not only for the rights of his creditors but also for future student loan applicants. The filing of the bankruptcy petition was not illegal, but in our view it was done in such a morally reprehensible fashion that it directly affects his fitness to practice law.

To foreclose any misconstruction of this decision, we must emphasize that this ruling should not be interpreted to approve any general principle concerning bankruptcies nor to hold that the securing of a discharge in bankruptcy is an act inherently requiring the denial of admission to the bar. We further do not wish this decision to be construed to hold that any comparable exercise of a clear legal right will necessarily imperil bar admission.[9]

In making our final determination in this case, we cannot ignore the fact that the action of this individual was not unusual conduct in his graduation year. In 1976 there were 8,461 bankruptcy petitions filed by college graduates in order to eliminate legal responsibility for student loans. The number was sufficient to move Congress to amend the bankruptcy act to limit the circumstances under which an adjudication of bankruptcy will operate to discharge federally insured student loan obligations. 20 U.S.C.A. s 1087-3 (1978). *See State v. Wilkes*, 41 N.Y.2d 655, 394 N.Y.S.2d 849, 363 N.E.2d 555 (1977). Student loan bankruptcies have resulted in litigation elsewhere. *E. g., Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977); *Handsome v. Rutgers University*, 445 F.Supp. 1362 (D.N.J.1978). A concurring judge in the *Girardier* case expressed his view on the "fresh-start" purpose of the bankruptcy act as it pertains to student loan bankruptcies thusly: "(A) ppellants have obtained far more than the fresh start contemplated by the Bankruptcy Act they have obtained a head start because each has secured something of value that cannot be lost or taken away and which will give each appellant a continuing, lifelong economic benefit. . . ." 563 F.2d at 1278.

We find the conduct of the petitioner in the instant case, although not illegal at the time, morally reprehensible. While we recognize that a significant segment of his generation behaved similarly, in our minds his conduct was clearly wrong. There may be justification for the assertion that the moralities of this exercise of a clear legal right were not fully considered or understood by the young people who undertook these student loan bankruptcies. Many have now found their future professional careers tarnished or jeopardized. In bar discipline or admission matters, we customarily take into account the youth and inexperience of attorneys in considering the appropriate action and we believe we should do so in this instance.

G. W. 50. waived his opportunity for a formal hearing on his moral fitness for bar admission. Therefore, he did not present other evidence of good moral character to the Board to offset the lack of good moral character indicated by his conduct leading up to the bankruptcy discharge. At a future hearing, the petitioner may be able to present evidence of good moral character to offset the circumstances now in the record.

Taking all of these factors into account, we now approve the finding of the Board of Bar Examiners, without prejudice to G. W. 50. to apply for a formal hearing before the Board to present evidence of his present good moral character.

It is so ordered.

SUNDBERG and ALDERMAN, JJ., concur.

HATCHETT, J., concurs in part and dissents in part with an opinion. (*cont.*)

BOYD, J., dissents with an opinion, with which ADKINS, J., concurs.

HATCHETT, Justice, concurring in part, dissenting in part. (*cont.*)

I concur with the majority in returning this case to the Board of Bar Examiners for further action in accord with the rule announced today. That rule is that “the securing of a discharge in bankruptcy is (not) an act inherently requiring the denial of admission to the Bar.”

Because there may be other cases involving applicants who have filed bankruptcy petitions, I find it important to more carefully delineate the scope of this court's review where bankruptcy is a factor. In doing so, I dissent to that portion of the opinion which finds that the applicant's activities proved him unfit. The majority's suggestion that a prospective lawyer seeking release from bankruptcy must consider future employment prospects before filing his petition places a “chilling” effect on his exercise of his right to be “freed from debt” and invades areas exclusively reserved for federal action under Article I, Section 8, of the Constitution of the United States. The fact that the applicant failed to produce (or chose not to produce) written evidence of correspondence at an informal hearing proves nothing. The Referee in bankruptcy found sufficient evidence to grant the applicant's petition in bankruptcy. This court is prohibited from further investigation into that finding.

Requesting Bar admission forms in February is insufficient proof that one had already made a decision to practice law in Florida in April.

While I disapprove of the course of conduct followed by this applicant and hundreds of other students who used this lawful route to avoid repayment of loans, I do not think we should impermissibly stretch the boundaries of our jurisdiction to accommodate this special situation.

BOYD, Justice, dissenting.

The Court holds that, alone, voluntary discharge of debts in bankruptcy is not sufficient to reject a candidate for admission to The Florida Bar. And it maintains that G. W. 50. is not rejected simply because he filed for discharge in bankruptcy. But, the Board of Bar Examiners' refusal to recommend G. W. 50.' s admission is upheld because the Court finds on the present state of the proceedings an indication of poor moral character and lack of fitness to practice law in view of G. W. 50.‘s conduct leading up to the proceedings in bankruptcy.

I am unable to draw the distinction the Court makes in this case. The bottom line of the Court's decision is that G. W. 50. may not be admitted now because of his avoidance of the repayment of federally insured student loans through his legal right to avail himself of the federal bankruptcy laws. Obviously, any American taxpayer is justified in resenting the use of the bankruptcy laws to avoid the indebtedness of federally insured student loans. But, to deny anyone admission on that basis presents for me two problems. The first one is it amounts to a denial of equal protection since the Board candidly admitted at oral argument that it does not consider voluntary bankruptcy by an out-of-state practitioner as a black mark on his fitness to practice when he seeks admission to The Florida Bar. For another, the decision is tantamount to disrespect for an act of the federal judicial system. Principles of comity demand that no adverse inferences be drawn from the federal decree of bankruptcy.

For the foregoing reasons I reluctantly dissent. I would admit G. W. 50. to the Bar.

ADKINS, J., concurs.

_____

1 Our authority to admit attorneys to practice in Florida derives from Article V, Section 15 of the Florida Constitution. The Board's authority derives from the Rules of the Supreme Court Relating to Admissions to the Bar (1975 Revision), Article I, Section 2, 32 Fla.Stat.Ann. 273 (Supp.1978).

2 Fla.Sup.Ct.Bar Admiss.Rule, art. II, § 12.

3 Fla.Bd.Bar Exam. Rule I, § 1.

4 Fla.Sup.Ct.Bar Admiss. Rule, art. II, § 12.

5 Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 50.Ed. 1230, 1235 (1934).

6 Fla.Sup.Ct.Bar Admiss.Rule, art. IV, § 19.

7 With respect to his undergraduate education, the petitioner testified: “I went to school for practically nothing out of my own pocket at (an eastern university).”

8 G. W. 50. at one point claimed that his law-related employment overtures were not favorably received because his law school was new and unknown to Florida attorneys and that several prospective employers wanted to await his admission to the bar before hiring him. He has offered no explanation why, if that was the case, he did not withdraw his bankruptcy petition when, during the six-month "holding" period which he had arranged in the fall of 1976, he learned that he had passed the July bar examination.
9 Although not precisely germane to this proceeding, we agree with the petitioner that unfitness is demonstrated if it can be shown that an applicant formed an intent not to repay debts when the debts were incurred.

CMM Approach: Practitioners should identify the exact thing, and its nature, that is being asserted as 'consideration' sufficient under the law (note that the authors did not use the term "adequate," at least at first, for a reason that is hopefully now clear from Chapter V) to support this required element of contract formation. Next, in slightly asynchronous order, it should be determined whether the purported consideration falls into a category that does not constitute consideration based on the facts and the law (as discussed in this Chapter VI). If the answer to this inquiry is that something is, or may be, consideration because it does qualify as non-consideration set out in this Chapter, then it is appropriate to undertake the analysis set out in Chapter V – the sufficiency, and if necessary, the adequacy, questions. Stated another way, the questions are: (1) is there a consideration problem?; (2) is the thing asserted as consideration something that categorically had been ruled problematic or NOT to be consideration? (addressed in this Chapter); (3) if inquiry passes the first two questions, is the thing legally sufficient?; and (4) if the 'sufficiency' question is arguable based on something like a large disparity in value or evidence of tax evasion or fraud, is the thing 'adequate?'

Notes

12. Readers should be clear that the debtor in the *Florida Board of Bar Examiners* case was legally discharged from his debt but ran afoul of ethical considerations of becoming a licensed attorney in the State of Florida. Second, the majority opinion notes that Congress changed the rules on discharge of debt obligations to remove student loan debt from the list of obligations that are forgiven in bankruptcy. What this means is that such debts are no longer legally discharged. For this reason, that there is no longer discharge, student loan obligations would not be the subject of the law on moral obligations. The question is whether non-student-loan debts *would be legally discharged*, and if so, whether such other debts would be resurrected by a subsequent promise to repay all or part would renew the obligation.

    Another kind of *implied in law* discharge of obligation is found in *statutes of limitation* and *statutes of repose*. All U.S. jurisdictions have

enacted statutes of limitation to cut off the right to assert in court perceived causes of action, for reasons including that witnesses tend to forget important details over time and that people (including companies) should not be subject to years, if not decades, old, (the common legal term is *stale*) claims. Florida has a robust statute of limitations statute covering situations from contracts disputes to tort claims. *See* FLA. STAT. § 95.11 (2017) (which sets out categories of claims and the period within which lawsuits must be filed, or lost, for periods as long as 20 years after the claim arises to as little as 30 days). For written contracts, and with a few exceptions, the time within which a claim must be filed is five years. FLA. STAT. § 95.11(2)(b) (2017). Statutes of repose are similar to statutes of limitation, except that they encompass all possible causes of action. Stated another way, statutes of repose discharge duties to any and all causes of action arising out of a particular action or activity. A good example is FLA. STAT. § 95.11(3)(c) (2017) on the design, planning, or construction of an improvement to real property, which does not distinguish between contracts claims, tort claims, or any other types of claims. No matter what the statute of limitations period for a particular cause of action (in contract, in tort, etc.), no cause of action is legally enforceable after ten years from the commencement of the cause of action (or from the time that a latent defect or problem should have been detected).

13. At early common law, subsequent promises to pay a debt after a legal discharge, such as discharge in bankruptcy or after the running of the statute of limitations, were not enforceable. Many jurisdictions have since made promises to pay discharged debts (or actions indicating the intent to pay), which need not have been made in the first place, renew the obligation – at least up to the amount indicated if the repayment intent was for less than the amount owed. Restatement (Second) Contracts, which as has been noted is a decent source of generally followed common law, provides as follows:

> **§ 82 Promise to Pay Indebtedness; Effect on the Statute of Limitations**
>
> (1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.
>
> (2) The following facts operate as such a promise unless other facts indicate a different intention:
>
> (a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or

(b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or

(c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.[19]

§ 83 Promise to Pay Indebtedness Discharged in Bankruptcy

An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.[20]

14. After legal discharge by operation of law, there is a moral but not a legal duty to repay. However, a renewal of the commitment to repay in whole or in part when such is not required converts the promise into something binding. Stated another way, a recognition of the moral obligation to satisfy an outstanding debt renews it. There are other cases where a vow to pay with regard to a moral obligation converts it into a binding legal obligation. A case that many national casebooks include is *Webb v. McGowin,* 27 Ala. App. 82, 168 So. 196, 1935 Ala. App. 14 (1935). In that case, Webb was seriously injured by stopping the fall of a large block that would have hit McGowin. McGowin promised payment for life to Webb. Even though Webb's consideration had been fully performed before McGowin's promise, the court ruled that the moral obligation of McGowin was converted to a binding obligation upon McGowin's promise to make payments. It should be noted that there seems to be equity at work here – a moral obligation without more is not binding, but recognition of it or subsequent promise to compensate for it may be used to transform it into a binding agreement.

Problem 6-5

Assume that Contractor breached a contractual obligation and also committed a tort against Building Owner on the same day by leaving a hole in the floor that Building Owner could not see, and she fell to her serious injury – January 1, 2010. Pursuant to FLA. STAT. § 95(2)(b) (2017), by when would Building Owner have to file suit alleging breach of contract? Pursuant to FLA. STAT. § 95.11(3)(a) (2017), by when would Building Owner have to file suit alleging

19

20

the right to tort damages for negligence? Finally, what would happen if Building Owner filed suit for both claims on June 30, 2017?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 6

15. Exceptions to valid consideration, and exceptions to such exceptions
16. Legally imposed bars to litigation over contractual (and other) liability, and a possible exception to such bars
17. A basic understanding of novations
18. A basic understanding of accord and satisfaction

SUGGESTED EXERCISE(S)

21. Have students individually map out the main legal arguments in the main opinion of the *Florida Board of Bar Examiners Re: G.W.L.* case on an issue chart. (Diligent students may have already done so as part of their preparations for class). Then have students create columns for the concurrences and dissents, thereby being able to tell which parts of the main opinion are supported by a majority (and are therefore binding law) and whether there are any which are *not* supported by a majority of the Florida Supreme Court.

Chapter 7: CONSIDERATION SUBSTITUTES & SUFFICIENT SPECIFICITY OF ESSENTIAL TERMS

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As noted in Chapter IV, courts in the past were much more formalistic, i.e., less flexible and more demanding of parties before them to produce facts, as well as to carefully and to fully establish elements. Time has taught us that the real world does not really work this way, at least not all of the time. For example, two businesses may deal with each other regularly, and they may agree on several major terms in a contractual arrangement while leaving the

others to be agreed later, or at least to be implied by commercially reasonable practices. Nevertheless, the parties fully intended to be bound to the main terms and to agree on the others. If a problem arises, one of the parties may try to argue that the parties had not yet reached agreement, but courts would know better and would find ways to finalize and to implement the terms of the agreement. One of the mechanisms is use of the gap-fillers described in Chapter 4. A great example is U.C.C. § 2-207. Rather than allowing a party to argue that there was no specific offer nor a specific acceptance, courts could determine which was the offer, and then conclude that there was an acceptance, though some 'new' terms in it would be proposals that might or might not become part of the agreement. It is important to reflect on this flexibility and reasonableness. An important aspect of a court's job, or that of counsel, is to know when it is appropriate to 'cut some slack' by finding agreement and when it is proper to find some contractual requirement to be lacking. It is often a question of intent, flavored with a dollop of reasonableness.

The same is true for consideration. In the past, demonstrable, valuable consideration was required, and it often still is required. However, there are factual situations that call for the application of a more flexible, and therefore less formalistic, approach. In the past, for example, an option contract at common law required not only consideration for the thing to be done in return, but also a separate consideration for a promise by an offeror to keep the offer open and exclusive to the offeree. Thus, saying, "Thanks," to an offeror who agreed to give the offeree a week to decide whether to buy the offeror's car would not work in the past. Rather, something like, "Thanks, and for your promise to keep the offer open for me, I promise to wash your car before week's end," would be needed. First, there is the payment or promise to pay money for the automobile. Second, there is the promise to wash the car for the exclusive right to accept during the option period.

Early common law did not recognize the types of 'consideration substitutes' described in this Chapter. The *quid pro quo* had to be tangible. Over time, however, courts began to recognize situations where a rigid requirement for consideration led to injustice. Thus, over time, courts began to develop alternatives such as the consideration substitutes considered in this Chapter.

1. Promissory Estoppel

W.R. GRACE AND COMPANY v. GEODATA SERVICES, INC.

Supreme Court of Florida, 1989

547 So. 2d 919

OVERTON, Justice.

We have for review *Geodata Services, Inc. v. W.R. Grace and Co.,* 526 So.2d 922 (Fla. 2d DCA 1988), in which the district court of appeal held sufficient evidence existed to support an award of $433,000 in compensatory damages to Geodata Services based on theories of breach of contract and promissory estoppel. The district court noted that Florida law is unclear as to the circumstances under which promissory estoppel may be applied and certified the following question as one of great public importance:

> CAN THE DOCTRINE OF PROMISSORY ESTOPPEL BE APPLIED TO ENFORCE ORAL PROMISES WHEN NECESSARY TO PREVENT INJUSTICE IN SITUATIONS NOT COVERED BY THE STATUTE OF FRAUDS WHERE A PROMISOR MAKES AFFIRMATIVE REPRESENTATIONS WHICH HE REASONABLY SHOULD EXPECT WOULD INDUCE THE PROMISEE INTO ACTION OR FORBEARANCE OF A SUBSTANTIAL NATURE IF THE PROMISEE CAN SHOW THAT HE DID IN FACT RELY ON THE REPRESENTATIONS TO HIS DETRIMENT?

Id. at 927. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the question in the affirmative where the promise is definite, of a substantial nature, and established by clear and convincing evidence. However, we find the evidence here was insufficient to establish a breach of contract and further find that promissory estoppel does not apply due to a failure of a showing of definiteness and of substantial inducement by clear and convincing evidence.

To properly address the issues presented, it is necessary to set forth extensive factual circumstances. The petitioner, W.R. Grace and Company [Grace], is in the business of mining and processing phosphate, while the respondent, Geodata Services, Inc. [Geodata], is in the business of drilling prospect holes for phosphate companies. In October, 1980, Grace entered into a contract with Geodata to drill approximately 1300 prospective holes in Manatee County. Article III of the contract, entitled “Changes in the Scope of the Work,” expressly allowed Grace to increase or reduce the scope of the work by adding or eliminating items. It also authorized Geodata to submit a statement of additional fees and costs resulting from an increase in the scope of the work, but expressly required the parties to negotiate in good faith to agree upon any such additional payments and provided that “ ‘[n]o addition or change to the Work shall be commenced until such mutual agreement is reached.’ ” [Footnote omitted] *Id.* at 927 (Campbell, J., concurring in part and dissenting in part).

Article XI, entitled “Termination of Contract,” expressly provided that Grace, as owner, could terminate the contract at any time. [Footnote omitted] Article

XV, entitled “Miscellaneous,” contained a provision that no amendment or modification would be binding unless it was in writing, stating:

> “This Agreement sets forth the full and complete understanding of the parties hereto and supersedes all prior agreements, representations and understandings oral or written, relating to the subject matter hereof.
>
> No amendment, modification or supplement to this Agreement shall be binding unless it is in writing and duly executed and delivered by each of the parties hereto.”

Id. at 928. [Footnote omitted]

The parties operated under this contract from October, 1980, to June 18, 1982, during which time the contract was amended nine times by written agreement between the parties, with most of the amendments increasing the scope of the work for Geodata. Critical to the issues in this cause is the testimony of Geodata's president concerning his communications with Grace on three separate occasions. He explained that shortly after the contract was signed in 1980, he had a conversation with employees of Grace about giving him additional work and that, following the conversation, he acquired a piece of equipment in order to do additional work. Of the nine modifications to the contract subsequent to this conversation, most were principally for additional work that was granted to Geodata.

Next, Geodata's president testified that, in October, 1981, he had another conversation with Grace employees in which they stated that “they thought I would be down in Manatee area probably three to five years drilling options.” A third conversation occurred in April, 1982, in which he expressed the view that he was nervous because the economic situation was getting bad and he expressed his concern to Grace's employees because he had a pretty large debt reduction to make at the banks. He stated that Grace's employees told him that he didn't need to worry and was told they would have work for him for fifteen to twenty years. He also stated that, as a result of his having other jobs ending and the contracts not being renewed, he “tried to get down to just operating two rigs for W.R. Grace.”

The purported tenth amendment to the contract resulted in the dispute now before this Court. The amendment was proposed in a letter dated May 25, 1982. Therein, Geodata requested additional compensation for drilling holes that were deeper than 150 feet. In the request, Geodata's president stated that the reduction in the number of holes to be drilled had eliminated some of the 150-ft. holes but none of the 200-ft. holes and explained how having a larger percentage of deeper holes to drill increased the difficulty and costs of drilling. In a memo dated May 27, 1982, an employee of Grace deemed the

request reasonable and recommended approval. Significantly, this was for work already completed, not future work as contemplated by article III of the contract. On June 3, 1982, the manager of Grace's Phosphate and Development Division rejected the requested change in a memorandum, stating:

> Jim Bromwell's request for additional compensation on our holes from 150 feet to 200 feet is denied. I suggest since we have changed the scope of the original contract considerably, that we rebid the remaining drilling and see how competitive GeoData [sic] really is. I think this is a fair and equitable approach to a request like this, and undoubtedly, there are some hungry drillers out there that may want the job.

When advised that the request was denied, Geodata's president stated his company would continue drilling under the present price schedule. However, he also met with the manager of phosphate development and explained Geodata's need for more money in order to continue to operate under the contract. Geodata offered into evidence records showing that Geodata would have been entitled to approximately $1,500 in increased compensation had Grace honored Geodata's request for increased money for drilling the 200-ft. holes.

On June 18, 1982, Grace invoked the termination clause in the contract by written notice, stating: “Due to the current economic situation we request that you cancel the drilling of prospect holes in the mining area located in Northeast Manatee County.” Grace did not rebid the work. Testimony was unrefuted that a slump had developed in the phosphate industry during the latter part of 1981 and that Grace's decision to curtail the drilling was based on economic reasons that still prevailed at the time of the trial. Geodata's president acknowledged that economic conditions in the phosphate industry became progressively worse beginning in late 1981 through the summer of 1982, and he was aware that companies other than Grace were cutting out their drilling work. No drilling of the quantity or type performed by Geodata was subsequently conducted by Grace or another contractor hired by Grace.

With regard to the damages, Geodata presented evidence that it was a successful bidder for a $15 million project in Lima, Peru, in December, 1981, but that Geodata had declined to accept the contract because of the work he was doing for Grace. Grace asserts that this testimony should not have been considered by the district court of appeal because the president of Geodata testified concerning the Lima, Peru, contract as follows:

Q Are you claiming as a damage in this matter the lost contract in Lima, Peru?

A No, sir.

After Grace terminated the contract, Geodata went out of business. At trial an expert accounting witness testified that Geodata was worth $433,000 at the time Grace terminated its contract, but this was later clarified to reflect that Geodata's assets were valued at $433,000 but that it also had liabilities in approximately the same amount. The jury awarded Geodata $433,000 in compensatory damages and $300,000 punitive damages. The trial court, in post-trial motions, set aside the award of punitive damages but denied the requested relief by Grace of the compensatory damages amount.
Geodata appealed the elimination of the punitive damage award and Grace cross-appealed the award of compensatory damages. The district court affirmed the trial court's striking of the punitive damage award, rejected Grace's cross-appeal, and affirmed the trial court judgment awarding compensatory damages. The majority opinion recognized that Grace terminated the contract as a result of the bad economic conditions throughout the phosphate industry rather than because Geodata requested a price increase, but the court found a breach of contract for failure to negotiate in good faith under the provisions of article III and held that the jury's award of damages could be sustained on the theory of promissory estoppel.

* * *

Promissory Estoppel

The question which brings this cause to the Court is whether there is sufficient evidence to sustain the award of compensatory damages on the grounds of promissory estoppel. The district court found that Geodata's president was advised by Grace employees, after execution of the written contract, that they would give Geodata additional work beyond the contract if Geodata would purchase additional equipment. These reassurances of additional work, together with Geodata's rejection of a contract in Lima, Peru, represented sufficient evidence, in the district court's view, to establish promissory estoppel. The district court concluded that the subsequent assurances of additional work after the contract was executed were separate and apart from the provisions of the contract and found the contract was not controlling and held that, although Grace did award some additional work to Geodata, it failed to properly comply with the assurances its employees had given.

The basic elements of promissory estoppel are set forth in Restatement (Second) of Contracts § 90 (1979), which states:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is

> binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The character of the reliance protected is explained as follows:

> The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. *Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting* or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

Id. (emphasis added). This Court considered promissory estoppel in *Hygema v. Markley,*137 Fla. 1, 187 So. 373 (1939), but rejected its application because the promise "was not definite but, on the contrary, was entirely indefinite *as to terms and time.*" *Id.* at 19, 187 So. at 380 (emphasis added). Further, in *South Investment Corp. v. Norton,* 57 So.2d 1 (Fla.1952), we said: "[O]rdinarily, a truthful statement as to the present intention of a party with regard to his future act is not the foundation upon which an estoppel may be built." *Id.*at 3. In *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.,* 190 So.2d 777 (Fla.1966), we had before us an action for enforcement of a doctor's employment contract with a hospital in which the parties agreed orally that the doctor's employment was terminable only after five years and on ninety days' written notice. In that case, we refused to apply promissory estoppel and stated: "The question that emerges for resolution by us is whether or not we will adopt by judicial action the doctrine of promissory estoppel as a sort of counter action to the legislatively created Statute of Frauds. This we decline to do." *Id.* at 779. The district court found this case inapplicable because it concerned an employment contract.

Geodata grounds its promissory estoppel claim on asserted Grace employee representations that Geodata's services would be required for a considerable period of time without any regard whatever to the termination provision of the contract or the contractual requirement that any modifications, amendments or changes be in writing. The only possible inducement occurred after the first statement, allegedly made shortly after the contract was signed, that Grace would give Geodata additional work if Geodata would procure certain equipment. Grace did in fact give Geodata more work after that statement was made and the equipment was acquired. A second statement was made in October, 1981, to Geodata's president who was told "that they *thought* I would be down in Manatee area *probably* three to five years drilling options." A third

and final statement occurred in April, 1982, to Geodata's president by Grace employees that they would have work for him for fifteen to twenty years. We find no inducements, substantial or otherwise, were established in this record as a result of the second and third statements and none of the three are sufficiently definite in time or term or reasonableness to comply with promissory estoppel principles.

For promissory estoppel to be applied, the evidence must be clear and convincing. The evidence in this case fails to show any substantial inducement that would justify the application of promissory estoppel, particularly given the circumstances and who was making the statements. To so hold in this instance would wreak havoc with basic contract law. As Judge Campbell expressed in his dissent:

> [M]ere expectations based upon oral representations regarding future rights of parties to a contract specific in its written terms has been held to be insufficient to support a cause of action. *Smith v. Piezo Technology and Professional Administrators,* 427 So.2d 182 (Fla.1983); *Harbour Square Development Corp. v. Miller,* 517 So.2d 773 (Fla. 2d DCA 1988); *Ochab v. Morrison, Inc., d/b/a Ruby Tuesday and Keith Grubb,* 517 So.2d 763 (Fla. 2d DCA 1987); *Ponton v. Scarfone,* 468 So.2d 1009 (Fla. 2d DCA 1985); *Muller v. Stromberg-Carlson Corp.,* 427 So.2d 266 (Fla. 2d DCA 1983); *Catania v. Eastern Airlines, Inc.,* 381 So.2d 265 (Fla. 3d DCA 1980).

526 So.2d at 930. The law of written contracts, including the statute of frauds, would be substantially changed if we approved the application of promissory estoppel under the facts of this case. It would also become extremely difficult for parties to fully understand or be advised of their rights and obligations under written contracts.

Accordingly, for the reasons expressed, we quash the decision of the district court of appeal and remand this cause with directions to enter a judgment in favor of W.R. Grace and Company.

It is so ordered.

EHRLICH, C.J., and McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.

A. Detrimental Reliance on Promise by Defendant

W.R. TOWNSEND CONTRACTING, INC. v. JENSEN CIVIL CONSTRUCTION, INC.

District Court of Appeals of Florida, First District, 1999

728 So. 2d 297

BROWNING, J.

W.R. Townsend Contracting, Inc. (“Appellant,” “Plaintiff,” or “Townsend Contracting”) appeals an order dismissing with prejudice its sixth amended complaint against Jensen Civil Construction, Inc., f/k/a Jensen of Jacksonville, Inc. (“Appellee,” “Defendant,” or “Jensen Construction”) for failure to state a cause of action. [Footnote omitted] Appellant contends that the order should be reversed because the allegations are legally and factually sufficient as to Counts I (breach of oral contract), II (promissory estoppel), III (quantum meruit), V (unjust enrichment), and VI (fraud in the inducement). [Footnote omitted] We affirm the order of dismissal as to Counts III and IV; reverse the order as to Counts I, II, V, and VI; and remand for a jury trial on the remaining counts.

In the general allegations of its sixth amended complaint, Townsend Contracting alleged the following:

> 1. This is a cause of action for damages in excess of $15,000.00 exclusive of costs, interest and attorneys' fees.
>
> 2. Plaintiff is a Florida corporation operating and doing business in Jacksonville, Duval County, Florida.
>
> 3. Defendant is a Florida corporation operating and doing business in Jacksonville, Duval County, Florida. Defendant, at all times material hereto, did business under the name, “Jensen of Jacksonville, Inc.,” but changed its name to “Jensen Civil Construction, Inc.,” effective April 1, 1996,
>
> 4. In January 1996, the Florida Department of Transportation (“FDOT”) had a public bid for the extension of State Road 9A (“9A”) from J. Turner Butler Boulevard to Baymeadows Road in Jacksonville, Florida (“the 9A project” or “the project”). The FDOT promulgated extensive plans and specifications for the project that were specific in quality and quantity thus allowing contractors to bid on the project.
>
> 5. Defendant intended to bid on the project.
>
> 6. A large portion of the project involved obtaining and placing suitable fill material.

7. Although there are many sources for fill material in the Jacksonville metropolitan area[, t]he most cost effective sources for the purpose of bidding the project were the properties adjacent to the project site.

8. The property adjacent to the project is owned by four (4) different persons or entities (“the owners”).

9. Prior to the bid, three (3) of the owners had exclusive contracts with Eighteen Construction (“Eighteen”). The fourth owner had an exclusive contract with Plaintiff.

10. The bidders had to have bids from Plaintiff and Eighteen in order to secure the lowest market price at the time of the bid for obtaining and placing fill material.

11. While it was common knowledge within the industry that Plaintiff would have a low bid, only one other contractor, Superior [Construction, Inc. (“Superior”)], had actual knowledge of what the Plaintiff's bid price was and, in fact, Plaintiff and Superior had a contract with Plaintiff at the bid price for Plaintiff to obtain and place fill material on the project.

12. Seven (7) entities bid on the project. Two (2) of the seven, Defendant and Superior ..., had Plaintiff's bid. All of the bidders had Eighteen's bid.

13. The two bidders (Defendant and Superior) with Plaintiff's bid were the two lowest on the bid to the FDOT for the project. Plaintiff contracted with Superior and Defendant for a price that was lower than Eighteen's price. Defendant beat Superior by one thousand two hundred eighty-three ($1,283) dollars on a bid of almost twenty-one and a half million ($21,500,000) dollars. Almost one hundred fifty thousand ($150,000) dollars separated Superior from the third place bidder. A copy of the FDOT bid summary is attached hereto as Exhibit “A.” The difference in price between Plaintiff's bid and Eighteen's bid was much greater than one hundred fifty thousand ($150,000) dollars.

* * *

COUNT II

To state a cause of action for promissory estoppel, a plaintiff must allege facts that, if taken as true, would show 1) that the plaintiff detrimentally relied on a promise made by the defendant, 2) that the defendant reasonably should have

expected the promise to induce reliance in the form of action or forbearance on the part of the plaintiff or a third person, and 3) that injustice can be avoided only by enforcement of the promise against the defendant. *W.R. Grace & Co. v. Geodata Services, Inc.,* 547 So.2d 919, 924 (Fla.1989)(alleged representation by mining company's employees that drilling company's services would be required for considerable period of time, statement to drilling company's president that mining company "thought" drilling company "probably" would be drilling options for 3–5 years, and statement that mining company would have worked for drilling company for 15–20 years were not sufficiently definite in time, term, or reasonableness to be enforceable under promissory estoppel principles).

In support of its claim in Count II, Townsend Contracting re-alleged Paragraphs 1 through 13 of the general allegations, *supra,* and alleged further 1) that Jensen Construction needed to contract with Appellant because Appellee had only one of the two available fill sources for the road project, 2) that Jensen Construction knew Townsend Contracting had a contract with Superior to provide fill material on the F.D.O.T. project in the event Superior won the bid, and knew that Townsend Contracting stood to lose the profits from its contract with Superior if Appellant assisted Appellee in winning the F.D.O.T. contract (thus causing Superior to lose the bid); 3) that Townsend Contracting had refused to reveal its contract price to Jensen Construction, or to allow Appellee to rely on or use Appellant's contract price in the bid to the F.D.O.T. until Appellee promised Appellant that Appellant was the fill subcontractor on the road project, contingent upon Appellee's winning the bid; 4) that this promise was identical to the promise made by Superior to Appellant to get a contract with Appellant, 5) that subsequently, the contingency occurred and Jensen Construction was awarded the bid; 6) that Townsend Contracting reasonably relied on and acted on Jensen Construction's promise, to Appellant's detriment, when Appellant agreed to contract with Appellee and thereby allowed Appellee to use and rely upon Appellant's guaranteed bid in calculating Appellee's bid to the F.D.O.T., and Appellant's guaranteed bid was the lowest on the market when it was provided to Appellee and when the bid was made; 7) that after contracting with Townsend Contracting and using Appellant's guaranteed price to win the F.D.O.T. contract, Jensen Construction defaulted on its promise by not allowing Appellant to perform the work on which it had bid; 8) that Jensen Construction further denied that Townsend Contracting was a subcontractor on the project, and Appellee asserted the Statute of Frauds alleging that any contract could not be enforced; 9) that the enforcement of Jensen Construction's promise is necessary to prevent injustice in that but for Appellee's promise, Appellee never would have gotten Appellant's guaranteed bid and would not have won the bid with the F.D.O.T.; 10) that Townsend Contracting had substantially lower prices than Eighteen, the only other economically viable source of fill material; 11) that if Jensen Construction had used Eighteen for fill material, then Appellee would have lost the bid and

Superior would have won; 12) that Appellant has no adequate remedy at law because Appellee has asserted the Statute of Frauds on the contract claim, 13) and that Townsend Contracting has been damaged as a result of Jensen Construction's actions by loss of profits on the contract that Appellee promised to give Appellant, or, alternatively, 14) that Appellant has been damaged as a result of Appellee's actions by loss of profits on the contract Appellant had with Superior if Appellant had not acted on Appellee's promise.

Thus, the detrimental reliance alleged is that if Townsend Contracting had not been induced to give its contract price to Jensen Construction by the latter's promises, then the other contractor with which Appellant had a contract (Superior) would have secured the F.D.O.T. job (as the second lowest bidder), and Appellant would have been awarded the fill subcontract. Appellant notes that the fill prices reflected in Appellee's bid to the F.D.O.T. do not necessarily reflect the actual bid received from Appellant. Jensen Construction was free to submit to the F.D.O.T. whatever numbers for fill material it wanted to use. Therefore, the attachments to the complaint (which are not incorporated into Count II) are not determinative of whether Appellant's guaranteed bid to Appellee was the lowest on the market.

From our review of the pertinent allegations, we conclude that Appellant stated a cause of action for promissory estoppel. *AROK Construction,* 848 P.2d at 878 ("If AROK can show that it acted or detrimentally relied upon ICS's promise to award the contract, then promissory estoppel is available.").

* * *

B. Reasonable Reliance Induced

CROWN LIFE INSURANCE COMPANY v. McBRIDE

Supreme Court of Florida, 1987

517 So. 2d 660

SHAW, Justice.

We have for review *Crown Life Insurance Co. v. McBride,* 472 So.2d 870 (Fla. 4th DCA 1985), in which the district court certified the following as being a question of great public importance:

> May the theory of equitable estoppel be utilized to prevent an insurance company from denying coverage?

Id. At 871. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons set forth below, we answer the certified question in the affirmative to the limited extent expressed herein.

In November 1977, McBride, father of respondent, inquired of Crown Life whether group health insurance coverage offered through his newly accepted employment would cover respondent who was at that time twenty years old, suffering from a genetic premature aging disease, in a special high school class for slow learners, and financially dependent upon his father. During discussions with the Crown Life group service supervisor and the insurance broker through whom the employer had purchased the group policy, McBride was allegedly led to believe that respondent would be covered. McBride asserts that in reliance upon Crown Life's representations, he allowed the conversion option on the respondent's prior coverage to lapse and took out group coverage with Crown Life Insurance Company.

Respondent brought suit for recovery of benefits due under the written policy. Crown Life denied that respondent was a dependent under the policy, claiming that he was age twenty-three when the medical expenses were incurred and that he had been disabled from the inception of McBride's group coverage. [Footnote omitted]

The trial court allowed respondent to amend his complaint to include claims for recovery based on estoppel and oral contract. The court denied Crown Life's motion for continuance and, at the close of the evidence, directed a partial verdict finding that respondent was not entitled to recover under the written policy. The case went to the jury on the theories of estoppel and oral contract. The jury verdict and final judgment in respondent's favor on these theories was affirmed by the district court on the authority of *Kramer v. United Services Automobile Association,* 436 So.2d 935 (Fla. 4th DCA 1983), and *Peninsular Life Insurance Co. v. Wade,* 425 So.2d 1181 (Fla. 2d DCA 1983).

The general rule in applying equitable estoppel to insurance contracts provides that estoppel may be used defensively to prevent a forfeiture of insurance coverage, but not affirmatively to create or extend coverage. *Six L's Packing Co. v. Florida Farm Bureau Mutual Insurance Co.,* 268 So.2d 560 (Fla. 4th DCA 1972), *cert. discharged,* 276 So.2d 37 (Fla.1973). "[E]quitable estoppel is not designed to aid a litigant in gaining something, but only in preventing a loss. In other words, it will not avail in offense, but only in defense." *Kerivan v. Fogal,* 156 Fla. 92, 96, 22 So.2d 584, 586 (1945).

An exception to the general rule is the doctrine of promissory estoppel, a qualified form of equitable estoppel which applies to representations relating to a future act of the promisor rather than to an existing fact. *Southeastern*

*Sales & Service Co. v. T.T. Watson, Inc.,*172 So.2d 239 (Fla. 2d DCA 1965). In *South Investment Corp. v. Norton,* 57 So.2d 1 (Fla.1952), we noted that:

> The authorities recognize and apply the doctrine of promissory estoppel when the promise or representation relates to the abandonment of existing rights; but, ordinarily, a truthful statement as to the present intention of a party with regard to his future act is not the foundation upon which an estoppel may be built.

Id. At 3 (citations omitted). However, in *Mount Sinai Hospital, Inc. v. Jordan,* 290 So.2d 484 (Fla.1974), we found promissory estoppel applicable to a charitable pledge, recognizing that although "[a] mere gratuitous promise of a future gift, lacking consideration, is simply unenforceable as a nudum pactum. When the gratuitous promise is coupled with an inducement for others to subscribe, the promise is no longer void on its face." *Id.* At 486. The doctrine, however, only applies where to refuse to enforce a promise, even though not supported by consideration, " 'would be virtually to sanction the perpetration of fraud or would result in other injustice.' " *Southeastern Sales,* 172 So.2d at 241, (quoting 19 Am.Jur.*Estoppel* § 53 (1939)). Such injustice may be found where the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance substantial in nature, and where the promisee shows that such reliance thereon was to his detriment. *See Mount Sinai Hospital.*

We see no reason why this equitable doctrine should not also apply to insurance contracts. We note that several of the district courts have, in effect, found the concept applicable, albeit in the guise of equitable estoppel and/or oral contract. *Kramer; Wade; Burns v. Consolidated American Insurance Co.,* 359 So.2d 1203 (Fla. 3d DCA 1978); *General Motors Acceptance Corp. v. American Liberty Insurance Co.,* 238 So.2d 450 (Fla. 1st DCA 1970). We also note that, while our holding represents a minority view throughout the nation, a number of courts have adopted this position in recent years. *See, e.g., Travelers Indemnity Co. v. Holman,* 330 F.2d 142 (5th Cir.1964); *United Pacific Insurance Co. v. Meyer,* 305 F.2d 107 (9th Cir.1962); *Ivey v. United National Indemnity Co.,* 259 F.2d 205 (9th Cir.1958); *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.,* 140 Ariz. 383, 682 P.2d 388 (1984); *Lewis v. Continental Life & Accident Co.,* 93 Idaho 348, 461 P.2d 243, (1969); *Harr v. Allstate Insurance Co.,* 54 N.J. 287, 255 A.2d 208 (1969); *Martinez v. John Hancock Mutual Life Insurance Co.,* 145 N.J.Super. 301, 367 A.2d 904 (1976); *Security Insurance Co. v. Greer,* 437 P.2d 243 (Okla.1968); *Allstate Insurance Co. v. State Farm Mutual Automobile Insurance Co.,* 67 Or.App. 623, 679 P.2d 879 (1984); *Crescent Company of Spartanburg, Inc. v. Insurance Company of North America,* 266 S.C. 598, 225 S.E.2d 656 (1976). Accordingly, we answer the certified question in the affirmative to this limited extent, finding that the form of equitable estoppel

known as promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice.

Turning to the merits of this cause, we find that respondent failed to meet his burden of proving his detrimental reliance upon Crown Life's representations. The sole evidence submitted in proof of this essential element was McBride's testimony that respondent had been previously covered under McBride's group coverage offered through his prior employment and that he had the option of converting that coverage to an individual policy. Respondent offered no written policy, memoranda, witnesses, or other evidence to support this testimony. Further, respondent admitted that he did not know what benefits were offered under the conversion coverage. The record reveals no evidence as to the duration or extent of this alleged prior coverage. In short, respondent did not prove that the lapsing of the prior coverage was to his detriment or that refusal to enforce the alleged promise would sanction the perpetration of a fraud.

The jury also found for respondent on the theory of oral contract. Crown Life claims that the trial court erred in granting respondent's ore tenus motion to amend his complaint to include this theory of recovery and denying petitioner's motion for continuance for discovery regarding the alleged oral contract. It is within the sound discretion of the trial court to allow amendment of the complaint and such "leave of court shall be given freely." Fla.R.Civ.P. 1.190(a). However, since this theory of recovery was not asserted until trial, [Footnote omitted] we agree with Crown Life that it was error to deny its motion for continuance. Crown Life was effectively precluded from raising a viable defense to the claimed oral contract or from conducting discovery thereon. This error is harmless, however, for we find no evidence in the record of any consideration for this separate oral contract. Proof of detrimental reliance under respondent's estoppel theory of recovery would have supplied the missing element of consideration. However, as explained above, respondent was not successful in proving promissory estoppel. Accordingly, there is no competent, substantial evidence supporting the jury's finding of an oral contract.

For the reasons stated herein, we quash the decision of the district court and remand for proceedings consistent with this opinion.

It is so ordered.

C. Injustice Without Enforcement of Promise

JN AUTO COLLECTION, CORP. v. U.S. SECURITY INSURANCE COMPANY

District Court of Appeal of Florida, Third District, 2011

GERSTEN, J.

JN Auto Collection, Corp. (“JN”) appeals a directed verdict in favor of U.S. Security Insurance Company (“U.S.”). We reverse.

JN is a used car dealer in the business of buying and selling repaired vehicles, some of which have state-issued certificates of destruction. For several years, U.S. sold general liability garage keepers insurance to JN. In May 2006, U.S. added an endorsement to its garage keepers insurance policies, which excluded coverage for vehicles with state-issued certificates of destruction. None of the policies previously issued to JN included this exclusion. Therefore, JN was unaware of the new endorsement.

On January 16, 2007, JN renewed its insurance policy with U.S. over the phone, thereby creating a temporary insurance binder, pursuant to section 627.420, Florida Statutes (2006). The next day, an automobile with a certificate of destruction was stolen from JN's lot. Thereafter, JN made a claim under its policy for the theft, and U.S. began to investigate the claim.

In April 2007, U.S. issued the telephonically bound policy. The policy included the exclusion for vehicles with certificates of destruction. Subsequently, when U.S. failed to pay under the policy, JN sued for declaration of coverage and breach of contract, and the case proceeded to a jury trial.

At trial, the jury requested that the trial court ask the U.S. adjuster: “Was the policyholder ... advised formally of the endorsement to his policy on or before the effective date of the endorsement ... ?” The trial court posed the question, and the adjuster answered that she did not know.

In contrast, JN's president testified that he was not told about the endorsement. He further stated that, because of the nature of his business, he would not have purchased an insurance policy with such an endorsement.

The jury returned a verdict finding that U.S. breached its contract and awarded JN damages for the stolen vehicle. Thereafter, the trial court granted U.S.' motion for directed verdict, reasoning that the endorsement applied and excluded coverage for the theft. This appeal followed.

On appeal, JN asserts that the trial court erred in granting U.S.' motion for directed verdict because U.S. should be promissorily estopped from enforcing the endorsement exclusion.U.S., on the other hand, contends that the trial court properly directed the verdict on coverage because JN failed to prove promissory estoppel. We agree with JN and reverse.

Generally, insurance coverage cannot be extended by estoppel. *Crown Life Ins. Co. v. McBride,* 517 So.2d 660, 661 (Fla.1987); *Lloyds Underwriters at London v. Keystone Equip. Fin. Corp.,* 25 So.3d 89, 92 (Fla. 4th DCA 2009), *rev. dismissed,* 34 So.3d 2 (Fla.2010). However, an exception to this general rule is promissory estoppel. *Crown,* 517 So.2d at 661. Promissory estoppel should be applied where to refuse to enforce the promise "would be virtually to sanction the perpetration of fraud or would result in other injustice." 517 So.2d at 662 (*citing Se. Sales & Serv. Co. v. T.T. Watson, Inc.,* 172 So.2d 239, 241 (Fla. 2d DCA 1965)).

Promissory estoppel requires proof that: (1) the promisor made a representation as to a material fact that is contrary to a later-asserted position; (2) the promisee reasonably relied on the representation; and (3) the promisee changed his or her position to his or her detriment based on the representation. *See, e.g., Romo v. Amedex Ins. Co.,* 930 So.2d 643, 650 (Fla. 3d DCA 2006) (citing *FCCI Ins. Co. v. Cayce's Excavation, Inc.,* 901 So.2d 248, 251 (Fla. 2d DCA 2005)).

Silence, under circumstances in which there is a duty to speak, may constitute a misrepresentation. *Lloyds,* 25 So.3d at 93. If an insurer includes a new or unusual term when orally binding a renewal policy, it has the duty to advise its insured of the change. *See* § 627.420 (stating that an oral binder includes the usual terms of the policy).

In light of these legal principles, we find that U.S., as the promisor here, made a representation as to a material fact contrary to a later-asserted position. U.S. issued three prior garage keepers insurance policies to JN, none of which included the endorsement excluding coverage for vehicles with state-issued certificates of destruction. Therefore, the endorsement was not a "usual term" of the policy. Under these circumstances, U.S.' failure to inform JN that the new policy would include the exclusionary endorsement constituted a misrepresentation of a material fact. Accordingly, the record establishes that JN proved the first element of promissory estoppel.

JN also proved the second and third element, reasonable and detrimental reliance on U.S.' misrepresentation. JN was in the business of selling used vehicles, some of which had certificates of destructions. All its prior insurance policies had coverage for these types of used vehicles. Moreover, JN's president testified that he would not have bought an insurance policy without this coverage. Therefore, given the nature of its business, JN proved that to its detriment it was induced into buying an insurance policy which did not have the required coverage.

In this case, enforcing the policy endorsement to exclude coverage for the theft of JN's property would result in injustice. Accordingly, we reverse the

directed verdict in U.S.' favor, and remand for entry of judgment in accordance with the jury verdict.

Reversed and remanded with instructions.

CMM Approach: Careful use of terminology at this point is strongly advised to avoid confusion. Often, some of the terms in this area of contract law are used interchangeably. Experienced judges and lawyers would not misunderstand what was meant by use of terms like *promissory estoppel* and *detrimental reliance* – but law students may become confused. The first is a legal mechanism used by courts in appropriate situations – *estoppel* is the practice of a court disallowing the making of an argument that may otherwise legally be made where it would be unfair. The second is the contract law-based justification for asking a court to 'estop' an argument – to prevent unfairness when a party relied on some act or promise to his or her detriment. In short, the *estoppel* is the action requested by a party and taken by a court if appropriate. *Detrimental reliance on some promise* is the basis for a request for such action. Careful use of language helps to distinguish the practical, civil procedure aspects (requests to courts for application of the estoppel doctrine) from the doctrinal ones (the contract law subject of detrimental reliance on an express or implied promise). Use of this mechanism is a request for *equitable relief*, discussed in Chapter 12.

Note

The *W.R. Grace and Company*, *W.R. Townsend Contracting, Inc.*, and *Crown Life Insurance Company* are examples of promissory estoppel. Uniquely, the courts were willing to recognize a future right based on express or implied promises. Typically, the estoppel doctrine is used not to recognize an extra contractual right, but to prevent the assertion of one. A good example of the latter would be estoppel by waiver. In such cases, a party to a contract fails to enforce a right enough so that it would be unfair for such party to try to assert such right at a later date without warning. As discussed in the *Crown Life Insurance Company* case, promissory estoppel involves the recognition of a future right based on some kind of earlier promise (in that case, extra insurance coverage) and is therefore an *offensive* mechanism. In other cases, estoppel is used *defensively* to prevent an argument. The following problems may help to clarify.

Problem 7-1

After negotiating the purchase of widgets and signing an agreement but before shipping, Seller orally agreed to cover shipping costs on a particular sale. The widgets arrived, subject to turnover of possession by the shipper to Buyer once the cost of freight was paid. If Buyer sues Seller for payment of the shipping costs and Seller argues that only the terms of the written agreement applied what is the result?

Problem 7-2

Ashley is a paralegal, but she wants to attend law school. She has been a loyal employee for the past seven years and her employer, Octavia, views her as a second daughter. One day, Octavia tells her the following: "I will pay for half of your tuition if you remain working for me while you attend law school." Thrilled at the ability to finally afford law school tuition, Ashley applies and is accepted to law school. She immediately pays her first semester's tuition in full. Ashley then approaches Octavia and asks for reimbursement of half of her tuition. Octavia says, "Oh, I wasn't really serious when I said that. I'm not willing to pay for your tuition." Will Ashley be successful in recovering the half of her tuition payment from Octavia? Was Ashley reasonable in relying on Octavia's offer? On what basis? For the elements of promissory estoppel, *see, e.g., DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 93 (Fla. 2013).

Problem 7-3

Renter was required to pay the rent by the first of every month. In the seventh month of the rental arrangement, Renter sent Landlord a payment that was four days late, which the Landlord accepted without comment. Thereafter, Renter made late payments every third or fourth time without any reaction from Landlord. New Landlord acquired the leased property and the contracts of lease. New Landlord starts eviction proceedings after Renter made one late payment. Is New Landlord entitled to evict Renter for breach of contract? Does Renter have any argument to prevent the eviction? If so, what could New Landlord do to reinstate the first-of-the-month payment obligation?

Problem 7-4

In the past, two neighbors discussed the possibility of sharing the expenses of constructing a party wall to separate their respective backyards but they never formalized an agreement. Recently, Westerly Neighbor cleared a strip of land between the two backyards and dug a small trench. A few days later, Westerly Neighbor poured a concrete foundation. Easterly Neighbor was in her part of the yard barbecuing for family. A week further on, Westerly neighbor began to erect a brick wall on the foundation. Returning from a break in construction, Westerly Neighbor found a pitcher of lemonade on top of the unfinished brick wall. The neighbors never discussed the wall or its progress during the construction period. At the end of the month, after the

wall was completed, Westerly Neighbor is shocked to learn that Easterly Neighbor plans to pay nothing for the wall. Is Westerly Neighbor entitled to recovery from Easterly Neighbor for a share of the costs? On what basis? How does this problem differ from the other three? *See JN Auto Collection Corp.*, above. *See also, e.g., Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076-1077 (Fla. 2001).

2. Option Contracts & Detrimental Reliance

BRINE v. FERTITTA

District Court of Appeal of Florida, Second District, 1988

537 So. 2d 113

LEHAN, Judge.

The holders of an option to purchase real property appeal a summary final judgment adjudicating the option to be void. We affirm.

Appellants, the Brines, and appellees, the Fertittas, entered into a contract under which the Brines received an option to purchase real property owned by the Fertittas. The contract did not specify a time within which the option must be exercised but did provide that if the option were exercised more than one year after the date of the contract, the purchase price would be adjusted on the basis of a consumer price index. The contract also contained a section entitled "Period of Option and Extension," which provided that notice to exercise the option could be given during the year following the signing of the contract or "during any extension period." The contract further provided that the option "shall be extended by the purchaser paying the ad valorem taxes against the property for the year for which said taxes are assessed."

The contract was entered into in 1983 for an initial consideration of $2,500. The Brines paid the ad valorem taxes on the property in 1984 and 1985. In 1986 the Fertittas notified the Brines that they no longer considered the option valid. Nonetheless the Brines attempted to exercise the option and ultimately filed this lawsuit.

The complaint sought a declaration of the Brines' rights under the option contract and asked the court to enforce that contract. The complaint also sought relief based upon promissory estoppel, alleging that the Fertittas knew that the Brines intended to have the property's zoning changed from residential to commercial, that the Brines had in fact done so by expending considerable sums, and that as a consequence the value of the property had greatly increased.

The trial court granted the Fertittas' motion for summary judgment on the basis that the option contract provided no limitation upon the time of exercise of the option and was therefore void as an unreasonable restraint upon alienation. On appeal, the Brines contend that the trial court erred (1) by interpreting the option contract without considering parol evidence proffered by the Brines to show an intent of the parties that the option be exercised within a few, or four or five, years and (2) by denying the Brines' alternative claim for relief based upon promissory estoppel.

As to the first contention, we affirm the ruling that the option contract under its terms was void as an unreasonable restraint upon alienation. The reason is that the option was for an indefinite period and was, in effect, for a fixed price, i.e., a price which, while adjustable for inflation, was not adjustable for changes in the market value of the property. *See Iglehart v. Phillips,* 383 So.2d 610 (Fla.1980). There was no error in the court's refusal to admit parol evidence to show that the option was exercisable within a definite time period; the terms of the contract unambiguously permitted the option to be exercised during an indefinite period. *See Friedman v. Virginia Metal Products Corp.,* 56 So.2d 515, 516 (Fla.1952).

As to the second contention, we affirm the denial of relief under the claim for promissory estoppel. The allegations of that claim do not refer to any promise by the Fertittas other than the promise expressed in the option contract. Since under *Iglehart* that contract is void as against public policy, it should not provide the basis for the requested relief. *See* 22 Fla.Jur.2d *Estoppel and Waiver* § 68 at 508-09 (1980); 17 Am.Jur.2d *Contracts* § 232 (1964). *Cf. Tanenbaum v. Biscayne Osteopathic Hospital, Inc.,*190 So.2d 777 (Fla.1966) (the doctrine of promissory estoppel may not negate the application of the statute of frauds). Also, considering justifiable reliance as an element of promissory estoppel, see *Baxter's Asphalt & Concrete, Inc. v. Liberty County,* 406 So.2d 461, 466 n. 1 (Fla. 1st DCA 1981), *reversed on other grounds,* 421 So.2d 505 (Fla.1982); Swygert & Smucker, *Promissory Estoppel in Florida: Growing Recognition of Promissory Obligation,* 16 Stetson 50.Rev. 1, 43 (1986), we do not conclude in this case that reliance upon a promise the enforcement of which would be contrary to established public policy may be found to have been justifiable. Further, “The doctrine of estoppel, when invoked for the purpose of working a change in the title to land, is to be applied with great caution.” *South Investment Corp. v. Norton,* 57 So.2d 1, 3 (Fla.1952) (quoting *Lyon v. Morgan,* 143 N.Y. 505, 509, 38 N.E. 960, 961 (1894)).

In any event, the doctrine of promissory estoppel should not be applied if injustice can otherwise be avoided. *See Geodata Services, Inc. v. W.R. Grace & Co.,* 526 So.2d 922, 925 (Fla. 2d DCA 1988); *Dorsey v. Bacon,* 436 So.2d 1017, 1021 (Fla. 1st DCA 1983). As indicated below, it does not appear to

have been established that if an injustice to the Brines occurred, other relief would not be appropriate.

We do not conclude that equitable relief for the Brines, such as the return of moneys paid by them for ad valorem taxes, has necessarily been foreclosed. *See Iglehart,* 383 So.2d at 617-18. As did the Florida Supreme Court in *Iglehart, id.,* we deem it inappropriate to specify particular equitable relief, if any, and simply remand for further consideration in that regard.

Affirmed in part and remanded for proceedings not inconsistent herewith.

DANAHY, A.C.J., and FRANK, J., concur.

Notes

22. In the prior case, the court held the doctrine of promissory estoppel did not apply to the facts at hand as a consideration substitute. However, in the last paragraph, the court went on to state that the purchasers might still be entitled to equitable relief in some form. Readers may have noticed the term equitable estoppel or the idea of equitable relief stated in this case and others in this Chapter as well. This is a good time to distinguish between equitable estoppel and promissory estoppel, two terms that are not necessarily interchangeable. The concept of equitable estoppel predates the doctrine of promissory estoppel. The former originally developed to prevent injustice or fraud. To successfully invoke the doctrine of equitable estoppel a damaged party must show the following: (1) there is a representation of an existing or past fact that is (2) made to a party who reasonably relies on it, and (3) the party who made the representation is estopped if denial would result in injury to the relying party. Readers should take note that the first element requires the representation be of *past* or *existing* fact. This means that in scenarios where a present or future intention is made, the first element would not be met (this is because these present or future representations of intention are likely to change and are uncertain). In addition, if the promise were gratuitous (i.e., no sufficient consideration), there could be no remedy afforded based on equitable estoppel. As a result, the law of promissory estoppel arose as a substitute for those scenarios that lacked valid consideration. Readers should remember not to confuse these doctrines and not to apply the elements of equitable estoppel to a consideration-substitute analysis. Chapter XII will further expand on the principles of equitable estoppel in regard to contractual remedies.

23. Restatement (Second) § 90 sets out the basics of *promissory estoppel*, which was applied and is therefore also Florida law in the *W.R.*

Grace and Company case. There are two similar Restatement (Second) provisions, both involving option contracts: § 45 and § 87. Rather than submit to vagaries that would ensue for failure to compare and contrast these sections, it may be helpful to categorize them. Restatement (Second) § 45 provides:

15. Where an offer invites an offeree to accept by rendering performance and does not invite promissory acceptance, an option is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

16. The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

In short, subsection (1) calls for creation of an option, which keeps the offer open and exclusive to the recipient, for a unilateral contract (*see* Chapter II) once performance has begun. Subsection (2) makes clear that although an offeror may not be able to revoke a unilateral offer once performance has begun, the offeror does *not* have any duty to fulfill the offeror's side of the bargain unless the offeree finishes the expected performance. This may be effectuated by a court's ruling on *equitable estoppel* (i.e., the offeror is estopped from arguing the lack of contractual formation during the option period). What this does is grant the offeree a reasonable time to finish, but not the right to the return consideration if the offeree does not complete the expected performance. Test takers may want to register the fact that *mere preparation* to perform is not sufficient to create an option situation (though preparation efforts may be compensable pursuant to Restatement (Second) § 87(2).

Restatement (Second) § 87 (2017) provides:

> (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

What this does is to set forth the general rule on equitable estoppel from an offeror claiming the right to revoke an offer where the nature of the offer induces the offeree to commence performance. This subsection could be considered a "catch-all" to cover situations where it is not fully clear whether the offeror is seeking a return promise (bilateral) or a performance (unilateral). It also justifies some level of recovery even if an offeree does not finish performance, which sets is part from § 45(2). As an example, what if a contractor is promised $100,000 to put a new roof on a large building, and rents an expensive crane to reach the roof?

No work on the roof has yet commenced – but perhaps the nature of the parties' negotiations justifies the offeree's right to recoup the cost of the crane rental or some portion thereof.

24. Although this is a property law concept, it may be helpful to develop at least a basic understanding about the general prohibition on *restrictions against alienation* as a matter of public policy. This is the "first contention" in the *Brine* case. Briefly, public policy disfavors certain restrictions on the sale of land - the idea is to try to keep title to land free so that it may be transferred to beneficial uses and new parties. Sometimes, owners try to lock in a permanent or long-term prohibition on the ability to transfer land, such as for example "The land can never be sold to anyone outside the Hickory family until a Martian is elected U.S. President." As you can imagine, it may take a very long time indeed before the prohibition (restriction) is satisfied. Until then, the land could not be sold to Doctors Without Borders, or the Red Cross, or even to a business that needs the land for expansion, otherwise it will have to take its business (and jobs and tax revenue) out of the state. Some restrictions must be allowed, as owners have a strong expectation in determining where their land goes and how it may be used. Thus, "to my son if he finally graduates from law school, but if not, then to his sister and her family in fee simple" is acceptable. The land is tied up while the son is alive and *can* go to law school. If he does, and succeeds, the land is his (and he can sell it, will it to his children and their families, etc.). If he dies without graduating, within about one hundred years or less the condition will not be met, and the land will go to the sister and family. This is *not* too long, in the grand scheme of things. Note that the *Brin*e option was an express one and not the kind implied in law, as described in Note 2 immediately above.

3. Sufficient Specificity of Essential Terms

In the ideal world, there would be enough material to cover the fourth contractual element in its own Chapter. This is an area of contract law that suffers from a lack of clarity for the reason that the requirements of this element are often confused with similar elements of the other three (offer, acceptance, consideration). There is a subtle but important distinction that may explain the difficulty. Each of the first three elements of a contract has its own "definiteness" component. An offer requires essentials such as parties, price (or mechanism to determine price), the thing being done or transferred, etc. As a good example for a specific case, a contract for transfer of interest in real property must contain a property description sufficient to identify the property. *See Florida Bank and Trust Co. at West Palm Beach v*. Field, 157 So. 2d 261 (Fla. 1946) (lack of agreement on important terms prohibited an order of specific performance for sale of land). Moreover, an acceptance must be responsive, i.e., it must match relatively closely the expectations required by

the offeror (this includes a sufficient specificity aspect as well). Consideration must be legally sufficient, and if questionable, also adequate, which is not established for example if a promise is illusory, or if the thing asserted as consideration was a past debt discharged for a legal reason, such as in bankruptcy or by a statute of limitation. In other words, the consideration element requires an articulated and legally sufficient exchange by both (or all) sides. (*Readers may have noted that virtually all references are to two-party contracts for simplicity, but the same rules would apply to multiple parties in more complex contracts situations*). This too is a "sufficient specificity" or "definiteness" requirement.

The fourth element is often referred to as a "meeting of the minds" or a "mutuality" requirement, though Florida courts use the phrase "sufficient specificity of essential terms." What this requires is that the primary subject(s) of an offeror's currently intended, communicated and definite terms *match* the primary subject(s) of an offeree's currently intended, responsive and communicated terms. There may be a perfectly acceptable offer to sell Silky Sam (short for "Samantha," a milking cow). This may be matched by a perfectly acceptable acceptance of the offer to buy Silky Sam (the race horse). Each was valid, and the considerations on either side were legally sufficient (cash in return for a valuable animal, whether it be a milking cow or a race horse). The problem here is the lack of mutual intent on the thing to be transferred. Perhaps Florida's fourth element is best referred to as *mutually* sufficient specificity of essential term(s).

Difficulty with this fourth element is especially manifested in the case of potential "gap filling." Sometimes the parties fully intend agreement even though not all of the non-critical terms are clearly finalized. Other times, the parties are nearing agreement, but something very important to agreement is missing. One party will argue that this missing thing(s) is not a big deal and that there is agreement, with only a little clean up needed to determine the missing term(s). The other will argue that there was never an intent to have a deal without the missing term(s). (As noted in Chapter IV, terms of this importance are often referred to as *dickered terms* – the kind that a party would not allow to be implied). However, public policy favors holding agreements together. *See, e.g., Spring Lake NC, LLC v. Holloway*, 110 So. 3d 916 (Fla. Dist. Ct. App. 2d 2013) (long and complicated contract signed by an elderly person not necessarily lacking in mutuality absent showing of fraud, duress, etc.). Thus, there is pressure to hold together a binding agreement where some items are not nailed down with specificity.

Sometimes, however, a missing item is so vital to one party's agreement that its neglect requires a finding that the parties lacked proper mutuality. In this type of situation, courts should not imply any terms, but find agreement lacking for the failure of this fourth element. The case excerpted below makes

this point, although without particularly descriptive analysis. *See also Glosser v. Vasquez*, 869 So.2d 1179, 1181 (Dist. Ct. App 3d 2005).

CMM Approach: Treat the first three elements using an objective standard – what would the other party(ies) believe? That an offer with enough terms was made? That an acceptance reasonably responsive was made? That the consideration offered was sufficient? Assuming that all of these elements are satisfied, then apply a subjective standard to check whether the fourth element was satisfied. This could be done by asking one of two questions, depending on the facts and circumstances: (1) were the parties negotiating over the same thing? Or (2) was something not specifically negotiated and therefore possibly gap-filled only a small matter, or was it something so important that failure to address it indicates that the parties were still negotiating and had not yet reached agreement? A federal case buried in a note to follow explains that determining what is, and what is not, an essential term requiring specific address and agreement is not well settled in Florida. The thing to try to avoid is to wrestle with the fourth element on mutuality only to attribute its lack to one of the other elements. Example (of what not to do): "Seller was trying to sell a cow, but Buyer was trying to buy a race horse of the same name and also owned by Seller. Because Buyer did not know that Seller was selling a cow, Buyer's 'acceptance' was not responsive and would not operate as a proper acceptance. Rather, there was a clear offer, as well as a clear acceptance, and also the necessary, legally sufficient consideration. What is lacking is that fourth 'mutuality' element, i.e., the sufficient specificity of essential terms."

SUGGS v. DeFRANCO'S, INC.

District Court of Appeal of Florida, First District, 1993

626 So. 2d 1100

PER CURIAM.

Appellants (defendants in the trial court) seek review of an amended final money judgment entered against them. The judgment was entered pursuant to a provision contained in a letter which the trial court held to be a binding settlement agreement. Appellants contend that the judgment should be reversed because the letter lacks the essentials of a contract and, therefore, may not be treated as an enforceable settlement agreement. We agree.

Settlement agreements are interpreted according to the law of contracts. *Robbie v. City of Miami*, 469 So.2d 1384 (Fla.1985). To be enforceable, an agreement must be sufficiently specific, and reflect assent by the parties to all essential terms. *Williams v. Ingram*, 605 So.2d 890 (Fla. 1st DCA 1992). Where essential terms of an agreement remain open, subject to future negotiation, there can be no enforceable contract. *Central Properties, Inc. v. Robbinson*, 450 So.2d 277 (Fla. 1st DCA 1984), modified on other grounds, 468 So.2d 986 (Fla.1985).

Our review of the letter which the trial court held to be an enforceable settlement agreement convinces us that a number of essential terms were left open for future negotiation. As in Williams, the letter here is really nothing more than an agreement in concept. 605 So.2d at 894. Accordingly, no binding settlement agreement ever came into existence. Therefore, it was error to enter final judgment pursuant to a provision contained in the letter.

The amended final judgment is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED, with directions.

BARFIELD, ALLEN and WEBSTER, JJ., concur.

Note

The issue of what may be gap-filled and what may not is a difficult question. The following excerpt of a federal bankruptcy case analyzing Florida law is perhaps on the long side, but it is instructive on additional matters such as how an agreement may be cobbled together by several writings rather than from a single event.

IN RE ROLSAFE INTERNATIONAL, LLC
477 B.R. 884
Bankr. M.D. Fla. 2012

“D. General Principles of Contract Law

The determination of whether parties have entered into a binding settlement agreement is governed by the general principles of contract law. *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 905 (11th Cir.1987). Thus, there must

be an offer, acceptance, and consideration, as well as a meeting of the mind on all essential terms. *See Don 50. Tullis & Associates, Inc. v. Benge*, 473 So.2d 1384, 1386 (Fla. 1st DCA 1985) (noting that in order for a settlement agreement to be enforced, it must be "sufficiently specific and mutually agreeable on every essential element").

Florida law is clear that a settlement can be reached through a series of email exchanges. *See Warrior Creek Development, Inc. v. Cummings*, 56 So.3d 915 (Fla. 2d DCA 2011). Federal courts within the Eleventh Circuit have likewise held that a binding settlement agreement can be reached via email. *See, e.g., Miles v. Northwestern Mutual Life Ins. Co.*, 677 F.Supp.2d 1312 (M.D.Fla.2009); *Terra–ADI Int'l Dadeland, LLC v. Zurich American Ins. Co.*, 2007 WL 2460744 (S.D.Fla. Aug. 24, 2007); *Jarvis v. City Electric Supply Co.*, 2012 WL 933057 (M.D.Fla. Mar. 5, 2012).

Parties can expressly require the terms of the settlement to be memorialized in a formal document and executed by the parties in order to be enforceable. But there is no legal requirement that they do so. *Contrast Club Eden Roc, Inc. v. Tripmasters, Inc.*, 471 So.2d 1322, 1324 (Fla. 3d DCA 1985) ("Where the parties intend that there will be no binding contract until the negotiations are reduced to a formal writing, there is no contract until that time.") and *Long Term Management, Inc. v. University Nursing Care Center, Inc.*, 704 So.2d 669, 674 (Fla. 1st DCA 1997) (finding that the parties did not intend for a settlement to be binding until it was reduced to writing and executed by the parties, based on counsel's comments to the court that the settlement was "subject to [being written] down") to *Miles*, 677 F.Supp.2d at 1316 (holding that even though the settlement email contemplated a formal agreement fleshing out the essential terms contained within the email, there was no evidence that the parties did not intend to be bound by the terms recited in the email until and unless the more formal agreement was executed) and *Vital Pharmaceuticals, Inc. v. S.A.N. Nutrition Corp.*, 2007 WL 1655421, (S.D.Fla. June 6, 2007) (noting that "no objective evidence in the record provides any indication whatsoever that the parties did not intend to be bound until the agreement was written down and fully executed").

In fact, settlements may exist and be enforced even though they are not signed by the parties, or even reduced to writing at all. *See Vital Pharmaceuticals*, 2007 WL 1655421, at *6 ("Execution of the settlement agreement is not a condition precedent to a settlement agreement, but rather is merely a procedural formality."); *Bonagura v. Home Depot*, 991 So.2d 902 (Fla. 1st DCA 2008) (holding that the parties reached a valid, binding oral settlement agreement without contingencies); *Boyko v. Ilardi*, 613 So.2d 103 (Fla. 3d DCA 1993) (finding that the parties entered into a binding oral settlement agreement which was expressly agreed to by both parties).

In this case, as in Miles and Vital Pharmaceuticals, there is no evidence that the parties conditioned the settlement on the execution of a formal written settlement agreement. For example, there is no email from Davis to Kafka indicating that the Bank did not intend to be bound by its settlement offer unless Kafka signed a written settlement agreement Thus, the absence of a formalized, written settlement agreement executed by both the Bank and Kafka is not a barrier to the Court's ability to find that a settlement was actually reached. *See Patrick v. Christian Radio*, 745 So.2d 578, 580 (Fla. 5th DCA 1999) (holding that settlement was effective even though certain executory documents had not yet been executed). Similarly, the fact that Kafka never actually transferred the agreed-upon sum to the Bank is not an issue because "there is no requirement that settlement monies actually be transferred in order to find a particular settlement agreement is binding and enforceable." *State Farm Mut. Auto. Ins. Co. v. InterAmerican Car Rental, Inc.*, 781 So.2d 500, 502 (Fla. 3d DCA 2001); see also Patrick v. Christian Radio, 745 So.2d at 581 (acknowledging that the actual transfer of settlement monies is not a prerequisite to the court's finding of a binding, enforceable settlement).

The foregoing legal principles guide courts in fulfilling the important policy of enforcing settlements whenever possible: a policy to which both the Florida Supreme Court and the Eleventh Circuit Court of Appeals adhere. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla.1985); *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir.1994). Because settlement is a highly favored means of dispute resolution, this Court will enforce the settlement between Kafka and the Bank if possible (i.e., if the parties agreed on the essential terms of the settlement).

E. The "Essential" Terms of the Settlement

Courts may only enforce a settlement agreement if a valid, binding agreement exists in the first place. In order for a settlement agreement to exist, the parties must have agreed on all essential terms. *Spiegel v. H. Allen Holmes, Inc.*, 834 So.2d 295, 297 (Fla. 4th DCA 2003). However, uncertainty as to non-essential terms or small items will not preclude the enforcement of a settlement agreement. *Id.* Stated differently, a settlement will be enforced if it is sufficiently capable of implementation. *In re Sav–A–Stop Inc.*, 124 B.R. 356, 359 (Bankr.M.D.Fla.1991).

That the parties must agree on all essential terms, of course, begs the question what is an "essential" term, as contrasted to a non-essential term. Florida law is not particularly helpful on this issue, as the cases are legion in reciting the general—and generally unhelpful—proposition that "what constitutes an essential term of a contract will vary widely according to the nature and complexity of each transaction and must be evaluated on a case specific basis." *See, e.g., ABC Liquors, Inc. v. Centimark, Corp.*, 967 So.2d

1053, 1056 (Fla. 5th DCA 2007*); Giovo v. McDonald*, 791 So.2d 38, 40 (Fla. 2d DCA 2001) ("Certainly, what is an 'essential term' of a contract differs according to circumstances. But, surely, it must include the terms specified in an offer to make a contract."). Thus, while Florida law requires mutual assent on all essential terms, it is less clear what constitutes an essential term in any given transaction or proposed settlement."

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 7

(17) What are consideration substitutes
(18) What constitutes promissory estoppel
(19) What constitutes equitable estoppel
(20) What does it means to have sufficient specificity of essential terms (as the fourth element of contract formation)
(21)

SUGGESTED EXERCISE(S)

19. Have students review Restatement (Second) §§ 45, 87 and 90 and then craft their own examples, both promissory and equitable. Have students recount some of the examples and have the class verify the suitability of these examples.

20. Have students locate a hard copy or use an internet search engine for Restatement (Second) § 87 to check for any Florida cases on point. (Hint: Fifth District, 1982).

Chapter 8: REQUIREMENTS FOR BREACH, EXAMPLES OF BREACH, & ANTICIPATORY REPUDIATION

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Other contracts casebooks usually all commence with formation issues as does this one. Many others, however, jump into damages or into other special situations such as the laws on conditions, third-party beneficiary law, and similar. Before moving from formation issues to damages or other special cases, it may be valid to discuss at least briefly the concept of *breach of*

contract. The issue of breach is typically covered in upper level law courses such as a Remedies course or even Civil Procedure. Also, this is another area of contract law that students intuitively glean as they process mounds of information within the law school curriculum. In a way, it is probably like U.S. Supreme Court Justice Stewart's definition of hard-core pornography: "[P]erhaps I could never succeed intelligently to [define it] [b]ut I know it when I see it ….").[21] To avoid a break in logic, this casebook provides brief treatment of *breach* before moving on to *damages* then to other special areas of contract law.

This Chapter attempts to accomplish several other things in addition to providing some background on breach. First, it sets out the elements for establishing breach that a court would require in order for proceedings for breach to commence – which as you may have guessed includes facts of breach. Next, the materials turn to how terms in contracts are established in order to discern their existence, after which there may be a breach. Thus, Section A, subsection (ii) considers creation of contracts or provisions therein expressly as well as impliedly. Grasping the concepts of contracts or terms within contracts as implied-in-fact and implied-in-law at this point will make it easier to recognize and understand when it is addressed in later Chapters. This area of contract law is quite common. In Section A, subsection (iii) the materials introduce for the first time the concept of contractual *conditions* (which relate to formation), as distinct from contractual *obligations* or *duties*(which relate to damages or other remedies). Since prior to this subsection the materials address court-pleading requirements for establishing a potential case for breach of contract, from a practical standpoint, it was decided to include the necessity of raising *affirmative defenses* at the right time so as not to lose an important defense. This is a more practical matter well suited for coverage in a Civil Procedure course, and yet it is never too soon to develop an understanding of the distinction between contractual *breaches* and failures of contractual *conditions.*

Ultimately, the materials include in Section B an example of a common law breach, an example of a sale-of-goods contract (introducing the *perfect tender rule*), and the special case of *anticipatory repudiation*, which involves determining which party commits the breach where one party's ability to perform is uncertain.[22] In short, if a breach of contract is likely, but not definite, at what point may the "non-breacher" conclude that breach will occur and move to damages? If a "non-breacher" acts too quickly, when the likelihood of breach by the other party is still unclear, does that party in acting precipitously become the breaching party? Is there any way to clarify any uncertainty so as to prevent a party from being the breacher? In preparation for the last concept covered in this Chapter, it may be helpful to flesh out two examples that will frame the issue and make it easier to resolve.

21

22

1. Requirements of Filing a Breach-of-Contract Claim

The Florida judicial system contains five district courts of appeal with their own rule-making authority. Accordingly, the requirements for a proper breach-of-contract claim *could* vary (but they do not, really). *See* the Introduction of Chapter III (the system of precedent in the Florida judicial system). The first case below introduces how contracts, or distinct terms within contracts, may be created expressly, or may be either *implied in fact* (conduct of the parties evidences a contract or term therein), or *implied in law* (typically, court insertion of a contractual requirement on the basis of policy, such as a duty of contractual parties to act in good faith).[23] The second case delves more deeply into these distinctions. Finally, a note reminds about the role of courts (*questions of law*) and of the jury (or the judge in a bench trial) (*questions of fact*) in contracts cases. This is addressed briefly in Chapter I and is a valid topic to remember.

Also, try to discern which aspects of possible remedies are *legal*, (further addressed in Chapters IX - XI) as distinguished from those that are *equitable* (which are addressed in Chapter XII). For the latter, focus on the third and fourth paragraphs of the case that follows. (The next following case also addresses this distinction).

A. Requirements of a Valid Claim

BARON v. OSMAN
District Court of Appeals of Florida, Fifth District, 2010
39 So. 3d 449

PER CURIAM.

Johnny Baron, Jr., challenges the dismissal of his lawsuit against Cypress Tours, Inc., and Ahmed M. Osman, individually. We reverse.

Baron's claims are based upon an alleged agreement between Baron and Osman to cooperate in the undertaking of Cypress Tours, a one-bus charter business founded by Osman. The attachments to the complaint indicate Baron was issued 3030 shares in Cypress Tours and was appointed vice president and director of operations. Baron alleged that he and Osman orally agreed to

[23]

equally split sixty percent of the gross income and that Osman failed to pay Baron his share of the gross proceeds before terminating their business relationship. Baron's second amended complaint sought damages from Cypress Tours and Osman for breach of contract and unjust enrichment. Without explanation, the trial court dismissed Baron's second amended complaint with prejudice. We review de novo the dismissal and accept all well-pled allegations as true. *See Labance v. Dawsy*, 14 So.3d 1256, 1258 (Fla. 5th DCA 2009).

To state a cause of action for breach of contract, a complaint need only allege facts that establish the existence of a contract, a material breach, and resulting damages. *Friedman v. N.Y. Life Ins. Co.*, 985 So.2d 56, 58 (Fla. 4th DCA 2008). A valid contract arises when the parties' assent is manifested through written or spoken words, or "inferred in whole or in part from the parties' conduct." *Commerce P'ship v. Equity Contracting Co.*, 695 So.2d 383, 385 (Fla. 4th DCA 1997). A contract based on the parties' words is characterized as express, whereas, a contract based on the parties' conduct is said to be implied in fact. Id. The only distinction between an express and implied-in-fact contract is the manner in which the parties' assent is manifested or proven. See 1-1 Arthur 50. Corbin, Corbin on Contracts § 1.19 (Joseph M. Perillo ed. 2010); 1 Richard A. Lord, Williston on Contracts § 1:5 (4th ed. 2010). While the law will not recognize an implied-in-fact contract where an express contract exists, a contract may be inferred where an express contract fails for lack of proof. *See Quayside Assocs., Ltd. v. Triefler*, 506 So.2d 6, 7 (Fla. 3d DCA 1987).

If no express or implied-in-fact contract exists, a party may recover under quasi-contract. *Am. Safety Ins. Serv., Inc. v. Griggs*, 959 So.2d 322, 331 (Fla. 5th DCA 2007). A quasi-contract, which is synonymous with unjust enrichment, differs from an express or implied-in-fact contract in that it is not based upon the parties' assent. *Commerce P'ship*, 695 So.2d at 386. Rather, it is an obligation created by the law to remedy the unjust retention of a benefit conferred by another. Id. A cause of action for a quasi-contract will exist where: (1) a plaintiff conferred a benefit on the defendant; (2) a defendant had knowledge of the benefit; (3) a defendant accepted or retained the benefit; and (4) the circumstances make it unjust to retain the benefit without compensation. *Id.*

Baron's second amended complaint contains sufficient allegations to establish the existence of an express oral contract or, in the alternative, an implied-in-fact contract. Baron alleged that he orally agreed to provide his services in exchange for thirty percent of the gross income. Attached to the complaint were Cypress Tours' payroll records reflecting such payment. As Cypress Tours' director of operations, Baron acquired contracts for transportation with various clients and used the charter bus to provide transportation. These

facts, if proven, clearly evince that Baron was providing his services with the mutual understanding that he would share in the proceeds of the business.

Baron also alleged a material breach and resulting damages based on Osman's failure to fully compensate him before terminating their business relationship. Specifically, Baron alleged that he negotiated a contract with a community college on behalf of Cypress Tours and began providing transportation for the college's sporting events, but never received his share of the gross proceeds. As a result of that breach, Baron alleged damages of $67,001, or roughly thirty percent of the proceeds from the college contract, which he expected to receive in exchange for his services.

Baron also sufficiently alleged an alternative cause of action for quasi-contract. Baron alleged that he acquired a contract and provided transportation services, resulting in revenues for Cypress Tours. He further alleged that Osman knowingly accepted Baron's services, retained the resulting proceeds, and it would be inequitable for Osman to retain the benefit without compensating Baron.[Footnote omitted].

Based on the foregoing, we conclude the allegations in Baron's second amended complaint sufficiently stated causes of action for breach of an express or implied contract and quasi-contract. We reverse and remand for further proceedings.

REVERSED and REMANDED.

PALMER, TORPY and COHEN, JJ., concur.

B. Express & Implied Contracts or Terms Within Contracts

COMMERCE PARTNERSHIP 8098 LIMITED PARTNERSHIP v. EQUITY CONTRACTING COMPANY, INC.

District Court of Appeals of Florida, Fourth District, 1997
695 So. 2d 383

EN BANC

GROSS, Judge.

Equity Contracting Company, Inc.(“Equity”) filed a one-count complaint against Commerce Partnership 8908 Limited Partnership (“Commerce”). The count was set forth under the heading “Quantum Meruit.” The complaint contained the following allegations:

> Commerce was the owner of an office building. Commerce contracted with a general contractor, World Properties, Inc., to perform improvements on its property. Equity was the stucco and surfacing subcontractor for the job, having contracted with the general contractor to perform the work. Because it inspected the job on a weekly basis, Commerce was aware of Equity's work. Equity completely performed its subcontract and the reasonable value of its work was $17,100. Commerce failed to pay the general contractor the full amounts due for the job. The general contractor did not pay Equity. Commerce was unjustly enriched because it had accepted Equity's services without paying any entity for them.

In its answer, Commerce asserted that it had paid the general contractor in full.

At the non-jury trial, Equity presented its direct case in under 30 minutes. Equity's president testified that his company had contracted with the general contractor to stucco Commerce's property for $17,100. He indicated that at the start of the job he expected payment only from the general contractor and not from Commerce. Both the general contractor and a representative from Commerce inspected the work as it progressed. After the work was completed, Commerce gave Equity a punch list of remedial work. When Equity's president asked for at least partial payment from Commerce, the latter's representative indicated that “he couldn't do it.” Having received no payment, Equity did not complete the punch list. Equity brought suit against the general contractor, who later declared bankruptcy. Equity adduced no evidence regarding Commerce's payments to the general contractor under the construction contract or to any other party for work covered by the contract.

After Equity rested, Commerce moved for an involuntary dismissal, arguing that the evidence did not establish a contract implied in fact. Commerce's attorney contended that the term “quantum meruit” was synonymous with a contract implied in fact. The trial court denied the motion. During closing argument, Equity asserted that it had established a claim for quantum meruit, which it interpreted to mean unjust enrichment. Arguing that a quasi contract claim had first been injected into the case during closing argument, Commerce's attorney obtained permission to reopen his case. By this point in the trial, there was no agreement as to the cause of action at issue or the requirements of proof. The trial judge observed, “[w]e are in equity and I have some difficulty with wondering what the issues are and who is going to prove what.”

Commerce's witness testified that the contract price it had negotiated with the general contractor for the improvements was $256,894. He identified three payments totalling $223,065.04 that Commerce made to the general contractor—$173,088.07 in progress payments, $24,976.97 in response to

application for payment number 8, and $25,000 in final settlement of the general contractor's lawsuit against Commerce. Commerce also sought to introduce evidence that it had paid $64,097 directly to three subcontractors who had performed work on the building, who were not paid by the general contractor, and who had perfected mechanics' liens. The trial court sustained Equity's objection to this testimony on the ground of relevance.

Relying on *Zaleznik v. Gulf Coast Roofing Co., Inc.*, 576 So.2d 776 (Fla. 2d DCA 1991), the trial court entered judgment in favor of Equity for $17,100.

Contract Implied in Fact and Quasi Contract

This case is a paradigm for the confusion that often surrounds the litigation of implied contracts. [Emphasis added.]

A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words. 17 Am.Jur.2d “Contracts” § 3 (1964); 1 Arthur Linton Corbin, Corbin on Contracts §§ 1.18–1.20 (Joseph M. Perillo ed. 1993). Where an agreement is arrived at by words, oral or written, the contract is said to be “express.” 17 Am.Jur.2d “Contracts” at § 3. A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. *Id.*; 3 Corbin on Contracts § 562 (1960). It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact “rest upon the assent of the parties.” *Policastro v. Myers*, 420 So.2d 324, 326 (Fla. 4th DCA 1982); *Tipper v. Great Lakes Chemical Co.*, 281 So.2d 10, 13 (Fla.1973). The supreme court described the mechanics of this process in *Bromer v. Florida Power & Light Co.*, 45 So.2d 658, 660 (Fla.1950):

> [A] [c]ourt should determine and give to the alleged implied contract “the effect which the parties, as fair and reasonable men, presumably would have agreed upon if, having in mind the possibility of the situation which has arisen, they had contracted expressly thereto.” 12 Am.Jur. 766.

See *Mecier v. Broadfoot*, 584 So.2d 159, 161 (Fla. 1st DCA 1991).

Common examples of contracts implied in fact are where a person performs services at another's request, or “where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances” fairly raising the presumption that the parties understood and intended that compensation was to be paid*. Lewis v. Meginniss*, 30 Fla. 419,

12 So. 19, 21 (1892); *Tipper*, 281 So.2d at 13. In these circumstances, the law implies the promise to pay a reasonable amount for the services. Lewis, 12 So. at 21; *Lamoureux v. Lamoureux*, 59 So.2d 9, 12 (Fla.1951); *A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996); *Dean v. Blank*, 267 So.2d 670 (Fla. 4th DCA 1972); *Solutec Corp. v. Young & Lawrence Assoc., Inc.*, 243 So.2d 605, 606 (Fla. 4th DCA 1971).

A contract implied in law, or quasi contract, is not based upon the finding, by a process of implication from the facts, of an agreement between the parties. A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. 1 Corbin on Contracts § 1.20; *Tipper*, 281 So.2d at 13. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation. *Tipper*, 281 So.2d at 13; *Variety Children's Hosp. v. Vigliotti*, 385 So.2d 1052, 1053 (Fla. 3d DCA 1980).

The elements of a cause of action for a quasi contract are that: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it. *Hillman Const. Corp. v. Wainer*, 636 So.2d 576, 577 (Fla. 4th DCA 1994); *Henry M. Butler, Inc. v. Trizec Properties, Inc.*, 524 So.2d 710, 711–12 (Fla. 2d DCA 1988). Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other. *See Variety Children's Hosp.*, 385 So.2d at 1053. This is unlike a contract implied in fact which must arise from the interaction of the parties or their agents.

To describe the cause of action encompassed by a contract implied in law, Florida courts have synonymously used a number of different terms—"quasi contract,"[footnote omitted] "unjust enrichment,"[footnote omitted] "restitution,"[footnote omitted] "constructive contract,"[footnote omitted] and "quantum meruit."[Footnote omitted.] This profusion of terminology has its roots in legal history. Concerned about the confusion between contracts implied in law and fact, two legal scholars sought to "extirpate the term 'contract implied in law' from legal usage and to substitute for it the term 'quasi contract'." 1 Corbin on Contracts § 1.20. As Corbin explains, although the term "quasi contract" took hold, "the older term successfully resisted extirpation to the further confusion of law students and lawyers." *Id.*

The term "quantum meruit" derives from common law forms of pleading. The action of assumpsit was available for the "recovery of damages for the breach or non-performance of a simple contract ... or upon a contract implied by law from the acts or conduct of the parties." *Hazen v. Cobb*, 96 Fla. 151, 117 So.

853, 857 (1928). There were two divisions of assumpsit, general, upon the common counts, and special. *Id*. In general assumpsit, on the common counts, only an implied contract could be the basis of the action. The common counts were "abbreviated and stereotyped statements" that the defendant was indebted to the plaintiff for a variety of commonly recurring reasons, such as goods sold and delivered or work and labor done. 1 Corbin on Contracts § 1.18. The count asking judgment for work done was quantum meruit; for goods sold the count was quantum valebant. *Id*. The common counts were used to enforce contracts implied both in law and in fact. Because so many quasi contract actions were brought in the common counts, and because courts and lawyers were not careful to draw the distinction, the term "quantum meruit" is often used synonymously with the term "quasi contract." *Id*. at § 1.20.
At trial in this case, Commerce's attorney understood "quantum meruit" to mean a contract implied in fact. Equity and the trial court were proceeding under a theory of quasi contract. This confusion over "quantum meruit" is understandable, since there are cases to support both positions. For example, in *Rite–Way Painting & Plastering, Inc. v. Tetor*, 582 So.2d 15, 17 (Fla. 2d DCA), review dismissed, 587 So.2d 1329 (Fla.1991), the court noted that "contracts implied in fact, such as an action in quantum meruit, require the consent of the parties." Similarly, in *Dean v. Blank*, 267 So.2d 670, 671 (Fla. 4th DCA 1972), when this court characterized the action as an "assumpsit on a quantum meruit," we were referring to a contract implied in fact. On the other hand, *Aldebot v. Story*, 534 So.2d 1216, 1217 (Fla. 3d DCA 1988), declares that "[q]uantum meruit describes the extent of liability on a contract implied in law." This court, in *Maloney v. Therm Alum Industries, Corp.*, 636 So.2d 767, 769 (Fla. 4th DCA), *rev. denied*, 645 So.2d 456 (Fla.1994), used the term "quantum meruit" synonymously with "unjust enrichment." One case, *Tobin & Tobin Insurance Agency, Inc. v. Zeskind*, 315 So.2d 518 (Fla. 3d DCA 1975), suggests that the test for a quasi contract is the one appropriate for a contract implied in fact—"whether or not ... services were performed under circumstances in which the parties understood and intended that compensation was to be paid." *Id*. at 520.

The blurring of the distinction between contract implied in fact and quasi contract has been exacerbated by the potential for both theories to apply to the same factual setting. For example, a common form of contract implied in fact is where one party has performed services at the request of another without discussion of compensation. These circumstances justify the inference of a promise to pay a reasonable amount for the service. The enforceability of this obligation turns on the implied promise, not on whether the defendant has received something of value. A contract implied in fact can be enforced even where a defendant has received nothing of value.

However, where there is no enforceable express or implied in fact contract but where the defendant has received something of value, or has otherwise

benefitted from the service supplied, recovery under a quasi contractual theory may be appropriate. *See Lamborn v. Slack*, 107 So.2d 277 (Fla. 2d DCA 1958) (in which the court found a contract implied in fact but discussed the issue using quasi contractual principles). When properly raised in the pleadings, this overlapping of theories may require a fact finder to view the facts as they might apply to both. 3 Corbin on Contracts § 561(1960).

Contrary to Commerce's belief at trial, Equity was asserting a quasi contract claim against it, not a contract implied in fact.

* * *

[More of the Court’s discussion of the quasi-contract issue is excerpted in Chapter XII on Damages]

* * *

The judgment appealed is reversed, and the cause is remanded to the trial court to take additional evidence from the parties on whether Commerce made payment to or on behalf of its general contractor covering the benefits Equity conferred on the subject property. Equity shall have the burden of proving its claim of a contract implied in law that Commerce has failed to make such payment by the greater weight of the evidence. If the court shall determine that Commerce has not paid anyone for the benefits conferred by Equity, then it shall enter judgment for Equity; correspondingly, if the court shall determine that Equity has failed to prove that Commerce did not make such payment, then the court shall enter judgment for Commerce.

GUNTHER, C.J., and GLICKSTEIN, DELL, STONE, WARNER, POLEN, FARMER, KLEIN, PARIENTE, STEVENSON and SHAHOOD, JJ., concur.

C. Affirmative Defenses

In the Introduction to this Chapter and in Section A above, we discuss some practical information about bringing a breach of contract action (the requirements of establishing duty, breach, damages). We also explain briefly some of the differences between breach of contracts actions and failure of conditions situations in a CMM Approach below. Also in the Introduction we addressed, at least briefly, the fact that practitioners may think about, and argue, contracts cases working backwards. If there is an easy-to-prove exception, it makes sense to establish it up front and thereby make unnecessary the waste of court time, and client expense, on a full-blown breach of contract argument. (Recall that we did warn that this is perhaps not the best way to approach an answer on a law school or state bar exam).

As it turns out, thinking of easy-to-address exceptions, or "thinking backwards," is probably not only a wise idea, but it is also a legal requirement. This Section and the case excerpt probably go beyond the scope of a doctrinal contracts course, and therefore this is the kind of thing that students of contract law should try to glean as they read, but not necessarily to memorize or fret over until later in one's legal training. Nevertheless, a brief explanation or example is in order. One needs to learn the law first, and then exceptions to it. Exceptions do not have context without an underlying rule. Lawyers would not be able to effectively discuss an exception without intellectual mastery of the underlying rule – this how students must approach it. Judges and experienced lawyers can cut directly to exceptions due to their mastery of the underlying rules: law and practice require it.

NORTH AMERICAN PHILLIPS CORP., INC. v. BOLES
District Court of Appeals of Florida, Fourth District, 1981
405 So. 2d 202

HURLEY, Judge.

The suit below was an action to enforce a stock option agreement. After a bench trial, the court ruled for the plaintiff, finding that "Boles properly exercised his stock option ... by complying with all conditions precedent ..., or the conditions precedent were waived ...."

Appellant/defendant contends that the trial was infected with reversible error when the court overruled appellant's objection and admitted testimony relating to waiver of the conditions precedent, an issue which appellant suggests was not framed by the pleadings. We agree and, consequently, reverse.

Boles filed a two count complaint asking for damages or specific performance of the stock option agreement. The defendant answered and asserted three affirmative defenses, one of which was that Boles had not fulfilled certain conditions precedent. Boles, in turn, filed a pleading styled, "Reply to Affirmative Defenses," which denied the affirmative defenses.

At trial, Boles introduced a letter from his attorney addressed to defendant's predecessor-corporation wherein he sought to exercise the stock option agreement. Unquestionably, the letter does not satisfy all of the conditions precedent required by the agreement, however, Boles took the position that strict compliance had been waived due to certain action by the defendant corporation. Defense counsel objected to this line of testimony on the ground that it was irrelevant to the issues framed by the pleadings. The court overruled the objection and ultimately entered a verdict for the plaintiff.

Rule 1.100(a), Fla.R.Civ.P., provides in pertinent part:

> If an answer ... contains an affirmative defense and the opposing party seeks to avoid it, he shall file a reply containing the avoidance. (Emphasis supplied.)

The Supreme Court traced the evolution of Rule 1.100(a), Fla.R.Civ.P., in *Moore Meats, Inc. v. Strawn,* 313 So.2d 660 (Fla.1975), and, after an extensive review of a commentary by one of the draftsmen, the court held that matters constituting an avoidance of an affirmative defense "must be set forth in a reply pleading...." *Id*. at 661. The rationale for this requirement is that "(t)his is necessary in order to lay a predicate for such proofs so that the parties may prepare accordingly." Id. Indeed, the committee note to the 1972 amendment which added the provision in question to Rule 1.100(a) explains that "(t)he change makes a reply mandatory when a party seeks to avoid an affirmative defense...." 30 Fla.Stat.Ann. 29 (Supp.1981). *See American Salvage and Jobbing Co., Inc. v. Salomon*, 295 So.2d 710 (Fla.3d DCA 1974).

Long ago we abandoned rigid pleading requirements in favor of simplified rules which comport with due process. The case at bar, however, illustrates the fatal danger of not satisfying the rule's minimal requirements. By failing to specially plead avoidance and by only interposing a denial, the plaintiff allowed pre-trial preparation to center on the stock option agreement and those steps which the plaintiff took to seek its enforcement. Yet, with the introduction of the testimony at issue, the focus of the trial suddenly shifted to the conduct of the defendant ... what it had said or done to excuse plaintiff's performance of the conditions precedent. In truth, this was a blind issue which veered into the midst of the trial without warning and without an opportunity to negate. Its prejudice to the defendant is evident since it formed the basis of the court's verdict. Thus, we hold that the admission of this testimony over objection is so antithetical to basic notions of fairness as to constitute reversible error.

Since the foregoing is dispositive of the case, we do not reach the issue of the competency of the plaintiff's testimony regarding a Mrs. Gunderson. Though the court initially sustained defense counsel's objection, it receded from its ruling with the following remarks:

> Well, now, we will be here for about two weeks if we don't get down to the point. Your objection is I think technically correct. I don't think it is important. His understanding why he didn't get his option exercised is what the answer obviously will be. I think he is entitled to say what it is.
> (Tr.17).

It is now clear that the objected-to testimony is crucial to the case and, at retrial, it will be incumbent upon the court to make an initial determination as to its competency.

Accordingly, the cause is reversed and remanded for a new trial.

MOORE and BERANEK, JJ., concur.

Notes

17. The role that judges play in contracts cases is possibly greater than rulings on evidence and the conducting of proceedings before it. You may recall a brief discussion in Chapter 1. There are certain factual issues that judges decide rather than juries. This ties into contract interpretation, addressed *infra* in Chapter 14. Suffice it to say at this point that the judiciary, fearing the lack of experience and business context of juries, retains to itself the establishment and interpretation of a contract's elements, including what constitutes a breach of obligation. (*Think, what are the obligations?*) *See, e.g., Winter Gardens Citrus Grower's Ass'n v. Willits*, 151 So. 509, 511 (1933). The fact finder (the jury in a jury trial, and the court itself in a bench trial), on the other hand, determines whether the facts and circumstances demonstrate a breach. (*Think, were the obligations satisfied?*). *See, e.g., id.* and *Olin's, Inc. v. Avis Rental Car Sys. Of Fla.*, 131 So.2d 20, 21-22 (Dist. Ct. App. 3d 1961) (indicating that causes of action to be heard by a jury at common law at time of adopting the Florida Constitution still afford right to jury trial, but new ones do not require jury trial).

18. The Fourth District Court of Appeals addressed issues of *quantum meruit* and *quasi contract*, which will be covered as "equitable" forms of damages in Chapter 12. Though these concepts are not of primary importance for purposes of this Chapter, developing at least a passing familiarity with them along the way will prove helpful not only for understanding subsequent material, but it will also demystify the learning process.

19. Conditions "precedent" (and "concurrent" and "subsequent") are addressed later in Chapter 17. The importance of the distinction between failed conditions and breached obligations should not be underestimated.

CMM Approach: It is impossible to remember all case law, not to mention to recall many case names. Occasionally, however, certain cases are so seminal that remembering their names as well as their import is appreciated if not required in an exam answer. Further, definitive cases (of long standing or even of recent vintage) that change the law or better define it are on the minds not only of law professors and practitioners, but also of the authors of bar exam questions. This case was decided *en banc*, which is a special procedure by which the entire Court of Appeals, and not just a three-member panel of Court of Appeals judges, sits in order to decide cases that pose novel or particularly important issues – often that decide the course of law for decades to come. Each of the Florida Districts has internal court rules on how *en banc* hearings are governed. Additionally, this *en banc* opinion informs that the case is the "paradigm for confusion that often surrounds litigation of implied contracts." Takers of the essay portion of the Florida Bar Exam may want to take note.

2. Examples of Breach

The following two cases demonstrate two kinds of breaches. The first is a representative example of a breach at common law. Since the case is not particularly extensive, it is presented in its entirety to demonstrate the point about why many casebooks do not (directly) cover the topic of breach. It is typically addressed only briefly so that attention turns to more problematic issues such as the appropriate damages to be awarded. The second exemplifies a unique and important concept in the U.C.C. Article 2 sale of goods situation, i.e., what constitutes a breach in light of the *perfect tender rule*, adopted by Florida and found in FLA. STAT. § 672.601 (2017).

A. Common Law

GROSSMAN HOLDINGS LTD. v. HOURIHAN

Supreme Court of Florida, 1982

414 So. 2d 1037

McDONALD, Justice.

We have for review *Hourihan v. Grossman Holdings Ltd.*, 396 So.2d 753 (Fla.3d DCA 1981), which conflicts with *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918), and *Oven Development Corp. v.*

Molisky, 278 So.2d 299 (Fla. 1st DCA 1973), regarding the proper measure of damages for breach of a construction contract. We have jurisdiction, article V, section 3(b)(3), Florida Constitution, and disapprove the measure of damages applied by the third district in the instant case.

Late in October 1978 the Hourihans contracted with Grossman Holdings to purchase a house to be built in a planned development. Both the model and the office drawings showed the house with a southeast exposure, and the contract stated that Grossman would construct the house "substantially the same" as in the plans and specifications at the seller's office or as the seller's model. In December a new drawing went on display in the Grossman offices. It showed, among others, the Hourihan's lot and their soon-to-be-built house; unfortunately, the house in the new drawing faced the opposite way from what they expected and wanted.

The Hourihans brought this discrepancy to the attention of Grossman's employees and remonstrated against construction of a mirror image of the house they had contracted for. In spite of the Hourihan's objections, the contractors refused to change their plans and began constructing the house depicted in the December drawing. The Hourihans then sued in circuit court for breach of contract.

After a bench trial, the court found that Grossman had breached its contract. The court refused to award damages, however, finding that specific performance would be economically wasteful and out of proportion to the good to be attained and that the value of the house had increased substantially since the date of the contract. The district court agreed with the trial court's finding that the contract had been breached, but found that it had applied the incorrect measure of damages. Relying on *Edgar v. Hosea,* 210 So.2d 233 (Fla.3d DCA 1968), the third district held that the unreasonable economic waste doctrine does not apply to residential construction. It further found that Grossman's willful and intentional failure to perform according to the plans and specifications nullified its claim of substantial compliance with the contract. The court found the proper damages to be that amount necessary to reconstruct the dwelling to make it conform to the plans and specifications and remanded for a new trial on damages.

Grossman contends that Bayshore Development and Oven Development state the proper rule for determining the measure of damages for improperly constructed residences. These cases hold that the proper measure of damages is the difference in value between the building as constructed and as it should have been constructed. Grossman claims that subsection 346(1)(a) of the Restatement (First) of Contracts (1932) supports the diminution of value theory and urges this Court to adopt the Restatement as this state's law regarding damages for breach of a construction contract.

Subsection 346(1)(a)(footnote omitted) of the Restatement provides as follows:

> (1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
>
> (a) For defective or unfinished construction he can get judgment for either
>
> (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
>
> (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

The comment on subsection 346(1)(a) states:

> The purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him; but this does not mean that he is to be put in the same specific physical position. Satisfaction for his harm is made either by giving him a sum of money sufficient to produce the physical product contracted for or by giving him the exchange value that that product would have had if it had been constructed. In very many cases it makes little difference whether the measure of recovery is based upon the value of the promised product as a whole or upon the cost of procuring and constructing it piecemeal. There are numerous cases, however, in which the value of the finished product is much less than the cost of producing it after the breach has occurred. Sometimes defects in a complete structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste. If no such waste is involved, the

> cost of remedying the defect is the amount awarded as compensation for failure to render the promised performance.

Subsection 346(1)(a), therefore, is designed to restore the injured party to the condition he would have been in if the contract had been performed. This aim corresponds with general Florida law. *See Campbell v. Rawls*, 381 So.2d 744 (Fla. 1st DCA 1980); *Lake Region Paradise Island, Inc. v. Graviss*, 335 So.2d 341 (Fla.2d DCA 1976). We adopt subsection 346(1)(a) as the law in Florida regarding breaches of construction contracts.[Footnote omitted].

Applying subsection 346(1)(a) to the instant case, we find that the district court reached an incorrect conclusion. The subsection itself makes no distinction between residential and nonresidential construction. Indeed, the illustrations contained in the Restatement deal with both types of buildings. We disagree with the district court's conclusion that the rule as enunciated in subsection 346(1)(a)(ii) is applicable only to commercial buildings.[Footnote omitted].

Grossman also complains that the district court's ruling awards damages that are punitive in nature. Punitive damages are not recoverable for breach of contract, but where the acts constituting the breach also amount to a cause of action in tort, punitive damages may be recovered. *Nicholas v. Miami Burglar Alarm Co.*, 339 So.2d 175 (Fla.1976); *Griffith v. Shamrock Village, Inc.*, 94 So.2d 854 (Fla.1957). The Hourihans, however, presented only the breach of contract issue to the district court. The amount of compensatory damages flowing from a breach of contract is not affected by the manner of the breach.

Turning to the trial court's judgment, we agree in part and disagree in part with its findings. The record supports the trial court's finding that reconstructing the house would result in economic waste, and we will not disturb this finding. On the other hand, we find the trial court's refusal to consider awarding damages because of the then-current value of the house to be incorrect.

Damages for a breach of contract should be measured as of the date of the breach. *National Communications Industries, Inc. v. Tarlini*, 367 So.2d 670 (Fla. 1st DCA 1979*); Lake Region Paradise Island, Inc. v. Graviss*, 335 So.2d 341 (Fla.2d DCA 1976). Fluctuations in value after the breach do not affect the nonbreaching party's recovery. Here, it may be possible to demonstrate a difference in value as of the date of delivery between the house the Hourihans contracted for and the house that Grossman built. If such difference exists, the

Hourihans should have the opportunity to prove it on remand and recover that amount as damages.

We therefore disapprove the measure of damages applied by the district court, but we agree that the case should be remanded for a new trial on damages.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur.

ALDERMAN, J., dissenting:

I would approve the decision of the District Court of Appeal.

B. Perfect Tender Rule

Clarity in identifying the standard for breach is important. A breach is established where the thing supplied is not 'in conformity with the contract.' While there may be some flexibility in determining a breach at common law, Florida and other jurisdictions in sale-of-goods cases have not adopted a breach-avoiding standard of "it's good enough, or actually better." For an excellent discussion of this position from another jurisdiction, *see Ramirez v. Autosport*, 88 N.J. 277, 440 A.2d 1345 (1982). Later, in Chapter XVIII, the materials will point out a major difference between the common law and U.C.C. Article 2 rules in this regard.

JAREGUI v. BOBB'S PIANO SALES AND SERVICE, INC.

District Court of Appeal of Florida, Third District, 2006
922 So. 2d. 303

SCHWARTZ, Senior Judge.

The plaintiff purchased a piano from the defendant which was represented to be in new condition but was delivered with unacceptable damage. He appeals from the judgment of a successor judge vacating a judgment (footnote omitted) of his predecessor in plaintiff's favor for the return of the purchase price from the defendant (and that of the piano to the defendant) and found instead that he had sustained no recoverable damages.[Footnote omitted].

For two reasons, we vacate the post-judgment judgment on appeal with directions to reinstate the previous one.

1.

First, it is quite obvious that the successor judge lacked the power or authority to revisit, much less reverse, the previous decision on the merits. *See Groover v. Walker*, 88 So.2d 312 (Fla.1956); *Dep't of Revenue v. Riley*, 684 So.2d 905 (Fla. 3d DCA 1996); *Better Constr., Inc. v. Camacho Enters., Inc.*, 311 So.2d 766 (Fla. 3d DCA 1975), *cert. denied*, 325 So.2d 8 (Fla.1975).

2.

Second, and more important, the judgment on review was erroneous as a matter of law. It is based on the rationale that because, even in its defective condition, the piano was worth as much or more than plaintiff actually paid, no actionable damages had been sustained for breach of the contract for purchase and sale. *See Carter Hawley Hale Stores, Inc. v. Conley*, 372 So.2d 965 (Fla. 3d DCA 1979). It is the law, however, as reflected in the judgment rendered by the actual trial judge, that, in a case such as this one, the purchaser of non-conforming goods like the offending piano retains the option to claim either the difference in value or, as plaintiff clearly did in this case, in effect, to cancel the deal and get his money back. *See* §§ 672.711, .714, Fla. Stat. (2005*); Fryatt v. Lantana One, Ltd.*, 866 So.2d 158 (Fla. 1st DCA 2004); *Winterbotham v. Computer Corps, Inc.*, 490 So.2d 1282 (Fla. 5th DCA 1986*); Royco, Inc. v. Cottengim*, 427 So.2d 759 (Fla. 5th DCA 1983), *review denied*, 431 So.2d 989 (Fla.1983); *Carter Hawley Hale Stores, Inc.*, 372 So.2d at 965; *see also Music Acceptance Corp. v. Lofing*, 32 Cal.App.4th 610, 39 Cal.Rptr.2d 159 (1995)(applying rule to delivery of defective piano). This principle is based on the common sense idea that the purchaser is entitled to receive what he wanted to buy and pay for and that the seller is not free to supply any non-conforming item she wishes just so long as the deviant goods are worth just as much. *See* §§ 672.106(2), .601, .608, Fla. Stat. (2005); *Barrington Homes of Fla., Inc. v. Kelley*, 320 So.2d 841 (Fla. 2d DCA 1975). The initial judgment properly reflects this ethic and is therefore reinstated. [Footnote omitted]

Accordingly, the judgment under review is reversed and the cause remanded with directions and for further proceedings consistent herewith, including the assessment of attorneys' fees in plaintiff's favor under the pertinent provision of the sales agreement. [Footnote omitted].
Reversed and remanded.

Note

Sometimes, breaches may be the best solution. Take for example a seller (manufacturer) who experiences a major spike in production costs, a labor

strike, or other factor that would cause a serious loss if a contract were honored. What if the non-breaching buyer could secure an alternative source by way of cover at the same, or even at a cheaper, price? Would it not be better for both if the seller breached? There is a wealth of scholarly literature on the differences between, and the merits (or detriments) of, *efficient breaches* in comparison to *opportunistic breaches*. *See, e.g.*, Joseph M. Perillo, *Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH & LEE 50. REV.1007, 1024-1025 (2011); Gregory Klass, *Efficient Breach*: THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, pp. 362-387 (Klass, Letsas and Saprai, eds., Oxford University Press 2014); Daniel Friedmann*, The Efficient Breach Fallacy,* 18 JOURNAL OF LEGAL STUDIES 1 (Iss. 1, 1989); Ebrahim Shoarian and Roya Shirin Beig Pour, *The Effects of Intentional Breach of Contract with Emphasis on International Instruments*, 3 INT'L J. RESEARCH IN SOCIAL SCIENCES 119 (Iss. 2, 2013).

For the concept of "efficient" breach, the following example from Judge Posner admirably demonstrates the point:

> Suppose I sign a contract to deliver 100,000 custom-ground widgets at $.10 apiece to A, for use in his boiler factory. After I have delivered 10,000, B comes to me, explains that he desperately needs 25,000 custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me $.15 apiece for 25,000 widgets. I sell him the widgets and as a result do not complete timely delivery to A, who sustains $1000 in damages from my breach. Having obtained an additional profit of $1250 on the sale to B, I am better off even after reimbursing A for his loss. Society is also better off. Since B was willing to pay me $.15 per widget, it must mean that each widget was worth at least $.15 to him. But it was worth only $.14 to A – $.10, what he paid, plus $.04 ($1000 divided by 25,000), his expected profit. Thus the breach resulted in a transfer of the 25,000 widgets from a lower valued to a higher valued use.

Richard Posner, ECONOMIC ANALYSIS OF LAW 57 (1st ed. 1972). Professor Perillo defines any willing breach as an *opportunistic* one. *Restitution in a Contractual Context*, *supra* at 1025.

Research has not uncovered any Florida cases that squarely address the issue of efficient and/or opportunistic breach. *But see Citizens Property Ins. Corp. v. Ashe*, 50 So.3d 645 (1st DCA Fl. 2010) (considering the interplay between the tort-law collateral source doctrine and the contract-law concept of efficient breach in a case involving insurance claims from two separate policies – one for flood and one for wind damage). However, the following case does address a breach in the executory phase of a contract for sale of land where the

breaching seller was required to disgorge the profits on sale of fill dirt. Thus, the “opportunistic” profits were found to belong to the non-breaching buyer.

MAY v. MURROFF

District Court of Appeal of Florida, Fourth District, 1986

483 So. 2d 772

LETTS, Judge.

In the interim between entering into a contract to sell his land and the final closing thereof, the seller improperly sold fill from the land in question to a third party for $240,000. The purchaser claims that $240,000. We agree he should be entitled to it.

The trial court likewise concluded that the purchaser had been damaged by the illegal sale of the fill, but computed those damages on a per acre removed cost, vis-a-vis the total acreage being sold, resulting in a purchase price reduction of $122,067. As the seller and the trial court saw it, when land is permanently damaged, the proper assessment of damages is the difference between the value of the land before and after the injury. *See Atlantic Coast Line R. Co. v. Saffold*, 130 Fla. 598, 178 So. 288 (1938). Thus, since the purchaser here lost 25 acres, that is what he should be compensated for. We disagree.

The seller's breach here was deliberate and he should not be permitted to profit by his own wrong and enjoy a windfall profit of $117,933. The purchaser, under the facts and circumstances of this case, is entitled to the fruits of this wrongfully received windfall. *See Laurin v. DeCarolis Construction Co.*, 372 Mass. 688, 363 N.E.2d 675 (1977). The purchaser should be entitled to the value of the materials removed which is readily determined from the record at $240,000.[1]
We find no merit in the other points on appeal.

Accordingly, this cause is affirmed in part and reversed in part and remanded for the entry of final judgment in favor of the purchaser in conformance herewith.

AFFIRMED IN PART, REVERSED IN PART.

HURLEY, J., and LEVY, DAVID 50., Associate Judge, concur.

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[1] Both parties agree that the cost of restoration of the land would be an inappropriate remedy since the cost of the restoration would greatly exceed the diminution in the value of the property. *United States Steel Corp. v. Benefield*, 352 So.2d 892 (Fla. 2d DCA 1977), cert. denied, 364 So.2d 881 (Fla.1978).

Problem 8-1

On October 15, Olivia hired Andy to cater a dinner party she was hosting on November 1 for $2,000 payable after the dinner is served. Andy quickly agreed and began planning the courses for the dinner. On October 16, Andy's close friend Octavia contacted Andy and asked him to cater her dinner party on November 1 for $2,100. Andy, who would much rather cook for his friend Octavia than Oliva, told Octavia that he would be more than happy to cater her party. On October 17, Andy contacted Olivia and told her that he would not be catering her party, but that his business partner, Amanda, would be more than willing to cater her party for $2,000. Olivia quickly contacts Amanda and hires her to cater the party instead of Andy. May Olivia bring suit against Andy for breach of contract under the theory of efficient breach? Would your answer change if Andy had been paid $3,000 by Octavia and Olivia was unable to find a replacement caterer?

3. Special Case: Anticipatory Repudiation

As hinted in the introduction to this Chapter, some statements or actions make clear that a contractual obligation will not be fulfilled. In such circumstances where the inability or refusal to fulfill a contractual obligation is *unequivocal*, the non-breaching party may wait for performance or may treat the repudiation as a breach and sue for damages at the non-breaching party's option. (*Can you think of a reason why it might be helpful to allow a non-breaching party to treat the repudiation as a breach early on, rather than to force that party to wait for the time of performance? Can timely "cover" or replacement of services reduce the ultimate loss?*) A problem arises when the purported breach is not so clear, which is exemplified in *The Twenty-Four Collection, Inc.* case reproduced below. A note following the next two cases attempts to solidify the law on anticipatory repudiation in a more elemental, or "black letter," fashion. It also introduces the proper procedure for avoiding breach in the case of an uncertain, or *equivocal*, repudiation. The concept is sometimes also called *anticipatory breach*.

HOSPITAL MORTG. GROUP v. FIRST PRUDENTIAL DEVELOPMENT CORP.

Supreme Court of Florida, 1982

411 So. 2d 181

McDONALD, Justice.

This case is before us on a petition to review a decision of a district court, reported at 390 So.2d 767 (Fla. 3d DCA 1980). Because that decision conflicts with Thomson v. Kyle, 39 Fla. 582, 23 So. 12 (Fla.1897), we have jurisdiction. Art. V, s 3(b)(3), Fla.Const. We disapprove the district court decision.

The issue here is whether a prospective borrower, in an action for damages against a lender for its premature withdrawal of a commitment to loan funds, must prove that it had, or could have, fulfilled the conditions required under the contract to close the loan.

Petitioner, Hospital Mortgage Group, a trust, is in the business of lending money. It was the defendant and appellee below. Respondents are real estate developers who were the plaintiffs and appellants below. On November 27, 1973 the parties entered into two agreements, identical mortgage commitments, to provide financing for the construction of motels in Augusta, Georgia, and Rock Hill, South Carolina.

The commitments contained a number of requirements to be met by respondents and stated that the commitments “expired” on December 12, 1973. The documents that respondents were responsible for were to meet the approval of the lender's attorney.

The December 12th expiration date passed without the respondents complying. The parties met on December 31, 1973 and agreed to extend the commitments although they did not set a new expiration date. Work on the closing continued until April 27, 1974 when petitioner advised the respondents that the commitments were terminated. By letter dated May 7, 1974 petitioner outlined respondents' failure to comply in furnishing the documents and the passage of time as the reasons for termination. The documents that had been furnished by the respondents were returned.

Unable to find another lender, respondents leased the properties and brought suit for breach of contract damages. The trial was on liability only, and the trial court found that the lender “did not effectively terminate the two commitments” and that the borrower had not complied with the conditions precedent to the contracts. The court then granted the respondents thirty days to complete submission of the documents or else the lender's commitments would be terminated.

The respondents appealed stating that because five years had passed since the termination it was impossible to comply. The district court reversed, finding that an anticipatory repudiation by petitioner obviated the respondents' duty to tender all of the documents. The petitioner asserts that

the termination was due to the respondents' inability to obtain the required documents, and, therefore, respondents were not “ready, willing and able” to comply. The original commitment was for sixteen days, and the extended time ran for almost nineteen weeks.

The district court correctly found that the petitioner-lender had committed an anticipatory repudiation when it unequivocally terminated the two agreements. The correct way to terminate a contract after an extension to which no new termination date is fixed is to give the parties notice and a reasonable amount of time to attempt compliance. *See Felt v. Morse*, 80 Fla. 154, 85 So. 656 (Fla.1920); *Sound City, Inc. v. Kessler*, 316 So.2d 315 (Fla. 1st DCA 1975).

In dealing with anticipatory repudiations the law is clear that a repudiation gives rise to a claim for damages by the nonbreaching party. As stated in Restatement (Second) of Contracts § 253 (1979):

> (1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.
>
> (2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

Therefore, the nonbreaching party is relieved of its duty to tender performance and has an immediate cause of action against the breaching party. *Poinsettia Dairy Products, Inc. v. Wessel Co.*, 123 Fla. 120, 166 So. 306 (Fla.1936). This alone, however, does not entitle the nonbreaching party to damages. Anticipatory repudiation obviates the requirement that the conditions be performed, but not that they be performable.

As stated in the Restatement (Second) of Contracts § 254 (1979):

> (1) A party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise.
>
> The term “total failure” is defined in the comment to this section as:
>
> A failure is total in this context if it would have been sufficient to have discharged any remaining duties of the party in breach to

> render his performance. See s 242. The result follows even if it appears that the failure would have been justified and not a breach. *Cf.* § 244.

Id. at comment a (1979).

This reasoning is in accord with *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12 (Fla.1897), and *Slaughter v. Barnett,* 114 Fla. 352, 154 So. 134 (Fla.1934), requiring compliance with the contract provisions. In those decisions performance or tender of performance of conditions precedent was required as a prerequisite to recovery. The holder of the duty based upon a condition precedent cannot profit from an anticipatory repudiation of a contract that he would have breached himself. It follows that if performance of the conditions precedent is excused the ability to perform them must still be shown.

In the complaint the respondents alleged that they had provided all of the documents required by the agreements and had satisfied all acts required by the agreements with the exception of the time limitations. At trial, however, the judge found, and the district court concurred in his finding, that the respondents had not complied with the conditions precedent to the contracts. The sole reason for the extension of time was so that the respondents could correct their defective tender of the conditions precedent. The petitioner alleged and proved that this noncompliance caused the extension and that it continued through the termination date. Taking the facts as a whole then, to allow recovery by the respondents is to give them credit for doing what they were unable to do even after the termination date had been extended by nineteen weeks.

The rule of law followed by the district court is correct in that the respondents are able to bring suit on the anticipatory repudiation, but is incorrect in allowing recovery when they are unable to prove that they could have performed. The commitments involved are complex financing agreements that require the submission of numerous independent legal documents. The lack of any one may be fatal to the entire set of conditions precedent and thus to the petitioner's duty to lend the sums involved.

When the lender causes an anticipatory repudiation of a loan commitment after an extension of the termination date, the nonbreaching party is required to plead and prove compliance with all conditions precedent or the ability to comply if the performance has been excused by the repudiation.* Because the trial court found that the plaintiffs-respondents had not complied with the conditions precedent and the evidence was insufficient to support a finding that they could have performed them, we quash the decision of the district court and remand for it to order the trial court to issue a judgment for the petitioner.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON and ALDERMAN, JJ., concur.

ADKINS, J., concurs in result only.

* This rule is stated in 4 A. Corbin, Contracts § 978 (1951):

> **§ 978. Ability to Perform Remains a Condition even Though Actual Tender of Performance is Eliminated**
>
> In an action for breach by an unconditional repudiation it is still a condition precedent to the plaintiff's right to a judgment for damages that he should have the ability to perform all such conditions. If he could not or would not have performed the substantial equivalent for which the defendant's performance was agreed to be exchanged, he is given no remedy in damages for the defendant's non-performance or repudiation. Of course, the willingness and ability that remains a condition precedent in spite of the defendant's repudiation, is willingness and ability to perform if there had been no repudiation. The defendant's wrongful repudiation justifies the plaintiff in taking him at his word and at once taking steps that may make subsequent performance impossible. The willingness and ability to perform need not continue after the repudiation; it is merely required that they should have existed before the repudiation and that the plaintiff would have rendered the agreed performance if the defendant had not repudiated.
> (Footnote omitted in original.)

As a contractual relationship begins to sour, it may be difficult to determine which side committed the first breach/which was first to have the right to treat the other side’s action or non-action as an anticipatory repudiation.

TWENTY-FOUR COLLECTION, INC. v. WEINBAUM CONSTRUCTION, INC.

District Court of Appeal of Florida, Third District, 1983

427 So. 2d 1110

DANIEL S. PEARSON, Judge.

We reverse the final judgment entered in favor of M. Weinbaum Construction, Inc. and remand the cause for further proceedings.

The trial court, after a non-jury trial, entered a money judgment for Weinbaum, declared a mechanic's lien in its favor to the extent of the amount of the judgment, and denied The Twenty-Four Collection the relief sought in its counterclaim. To arrive at the foregoing result, the trial court necessarily had to conclude that Twenty-Four Collection, not the contractor, breached the contract under which Weinbaum was to make certain improvements to Twenty-Four Collection's leasehold.

There is absolutely no dispute in the record that on September 30, 1980, Weinbaum sent a mailgram to Twenty-Four Collection which stated, *inter alia*:

> "I would like to have ... an agreement to eliminate the penalty clause in our contract due to the number and scope of modifications you have made, ... prior to the close of business on Thursday, October 2, 1980, or I will be forced to stop the job and cancel the permit I hold."

Similarly, there is absolutely no dispute that either on October 1 or 2, 1980, the lessee locked out and thus prevented Weinbaum from doing further work on the job. What is disputed is whether the mailgram constituted a repudiation of the contract by Weinbaum which would allow Twenty-Four Collection to treat the contract as broken and, if so, whether, in fact, Twenty-Four Collection, when it precluded Weinbaum from further performance, acted in reliance on this repudiation, that is, whether it locked out Weinbaum before or after it had knowledge of the contents of the mailgram.[Footnote omitted].

We are able to settle only the first of these disputed issues. The law is clear that where one party to the contract arbitrarily demands performance not required by the contract and couples this demand with a refusal to further perform unless the demand is met, the party has anticipatorily repudiated the contract, *Pacific Coast Eng. Co. v. Merritt-Chapman & Scott Corp.*, 411 F.2d 889 (9th Cir.1969); *Placid Oil Company v. Humphry*, 244 F.2d 184 (5th Cir.1957); *Vermillion v. Marvle Merchandise Co.*, 314 Ky. 196, 234 S.W.2d 673 (1950); *Carrig v. Gilbert-Varker Corp.*, 314 Mass. 351, 50 N.E.2d 59, 147 A.L.R.. 927 (1943), which anticipatory repudiation relieves the non-breaching party of its duty to further perform and creates in it an immediate cause of action for breach of contract. *Hospital Mortg. Group v. First Prudential Dev.*, 411 So.2d 181, 182 (Fla.1982); *see also Mori v. Matsushita Elec. Corp.*, 380 So.2d 461 (Fla. 3d DCA 1980); *Ferslew v. Relaford*, 351 So.2d 368 (Fla. 1st DCA 1977). Weinbaum's demand that the penalty clause (which provided that the contract be completed by a certain date and, if not completed, that after such date a substantial daily penalty would be owed by Weinbaum) be eliminated, was a demand for extra compensation to which Weinbaum was not entitled by the contract. This demand, coupled with Weinbaum's threat to walk off the job and cancel the permit, was, as a matter of law, an anticipatory

breach of the contract, notwithstanding Weinbaum's argument that until its threat to stop the job and cancel the permit was actually carried out, the threat was too equivocal to constitute an anticipatory breach. A requirement of actual breach as a prerequisite for anticipatory breach would totally nullify the doctrine of anticipatory breach.

We cannot, however, settle the second of the disputed issues, which is clearly one of fact. It was for the trial court to determine whether Twenty-Four Collection fired the first shot or merely justifiably retaliated. Unfortunately, the trial court made no such determination. Instead, in its final judgment, it ruled

> "[T]hat anticipatory repudiation may not be relied upon as a defense, the same not being a part of the pleadings or defenses raised by the Defendant prior to the trial of this cause, nor permitted by amendment to conform to the proof, nor tried by consent.
>
> "Accordingly, the Defendant's contention cannot legally be sustained."

This ruling of the trial court was, in our view, totally unfounded. First, although it is arguable that anticipatory repudiation is an affirmative defense required to be raised by the defendant's pleadings, *see Jones v. Crooker*, 31 Misc.2d 946, 221 N.Y.S.2d 388 (Sup.Ct.1961), we think the better rule to be that a defendant's general denial to a plaintiff's breach of contract action places in issue the plaintiff's lack of breach of the contract. "[I]n order for the plaintiff to maintain its contract action, it must first establish performance on its part of the contractual obligations thereby imposed." *Babe, Inc. v. Baby's Formula Service, Inc.*, 165 So.2d 795, 798, 6 A.L.R..3d 320 (Fla. 3d DCA 1964); *Massey-Ferguson, Inc. v. Santa Rosa Tractor Co.*, 366 So.2d 90 (Fla. 1st DCA 1979). Second, since an anticipatory repudiation creates a cause of action for breach of contract distinct from any defense, *Lovett v. Lovett*, 93 Fla. 611, 112 So. 768 (1927), which cause of action was pleaded in Twenty-Four Collection's counterclaim and tried together with the issues raised in the complaint, it is clear that anticipatory repudiation was, contrary to the trial court's conclusion, a part of the pleadings. Finally, even if the issue of anticipatory repudiation were not properly raised by the pleadings, the trial court was absolutely incorrect in concluding that the issue was not tried by implied consent. Indeed, the trial court's conclusion is diametrically and inexplicably contrary to what the record of the trial reveals. Page after page of unobjected-to testimony of the principals and employees of the parties and nearly the entirety of the parties' closing arguments to the court are precisely devoted to the issue of anticipatory repudiation.[Footnote omitted]. Since it is clear that any issue, whether denominated an affirmative defense or a counterclaim, may be tried by implied consent, *C.A. Davis, Inc. v. City of Miami*, 400 So.2d 536 (Fla. 3d DCA 1981); *Davanzo v. Resolute Ins. Co.*, 346

So.2d 1227 (Fla. 3d DCA 1977); *Massey-Ferguson, Inc. v. Santa Rosa Tractor Co.*, 366 So.2d 90, and that when an issue is so tried, it is treated in all respects as if raised by the pleadings without the necessity of a motion to amend the pleadings to conform to the evidence, *DiTeodoro v. Lazy Dolphin Development Company*, 418 So.2d 428 (Fla. 3d DCA 1982), the trial court erred in failing to consider and determine the issue of anticipatory repudiation.

If after remand the trial court finds in favor of Weinbaum, then Weinbaum will be entitled, as it contends on its cross-appeal, to the final management payment of $2,500, a damage arising from the appellant's breach of the contract. The appellee will not, however, be entitled to a lien for that amount, *Cooper v. Passmore*, 103 Fla. 744, 138 So. 48 (1931). We reject appellee's contention on cross-appeal that it was entitled to the full amount of a claim assigned to it at a discount by Fandino & Sons, its subcontractor, since Weinbaum, by its contract with Twenty-Four Collection, was not entitled to the profit represented by this discount. In this latter respect only, the trial court's order is affirmed.

Affirmed in part; reversed in part, and remanded for further proceedings.

Notes

21. For anticipatory repudiation, one should look for an unequivocal sign that the other party is or must breach. Common law and sale-of-goods commercial law permit the non-breacher confronted with an unequivocal indication that the other party will not or cannot perform to wait or to treat immediately as breach and seek remedies. At common law, the test for ensuring that an equivocal or unclear statement or action is in fact sufficient to treat as an anticipatory repudiation is to request clarification first; a failure to answer, or to answer properly, *within a reasonable time*, constitutes the breach. This is a case where the common law and commercial law (U.C.C. Article 2 and the states' adoptions of same) are equivalent, with several small differences found in U.C.C. § 2-609, and Florida's FLA. STAT. § 672.609 (2017). Subsection (1) of the U.C.C.'s version (as adopted by the Florida Legislature) requires the request to be in writing; subsection (3) qualifies the time for answer to be within a reasonable time, *not to exceed 30 days*. The common law does not include the 30-day limit.

22. As noted above, a party faced with a potential repudiation must be clear that the expected performance(s) in fact will not occur. Treating an equivocal repudiation as a breach when it turns out not to be would turn the responder into the breaching party. The way to avoid this is to ask for clarification. More technically, and borrowing from FLA. STAT. §

672.609 (2017), it is right to request adequate assurances. (There should be no trouble using the same terminology in a civil law case).

23. In *The Twenty-Four Collection, Inc.* case, the court used the term *mechanic's lien*. Concepts such as this one sometimes fall through the cracks of a law school curriculum because they could be explained under more than one legal category (contract law, or property law, or secured transactions law, for example). The most common type of mechanic's lien is that held by a laborer to ensure payment for work on an automobile. *See* FLA. STAT. § 713.56 (2017) (for machines, engines, apparati, etc. – it is not limited to "automobiles"). There are a variety of other liens, for example to secure payment for work on vessels, for recovering, towing or storing vehicles, vessels and motor homes, and even for construction work done to structures on real property such as roofing work. *See* FLA. STAT §§ 713.50 –.79 (2017). Practitioners should be aware of the ability to secure payment for work done by attaching real property or personal property, which is subject to judicial sale to ensure repayment. Every jurisdiction has special requirements for notifying of intent to take a lien, filing requirements including sometimes tricky dates and the places to notify and file, judicial seizure and sale if the debt is not paid, etc. A favorite may prove to be a *charging lien*, which is a lien filed by an attorney to secure payment for work done before a client replaces such attorney with another. *See* FLA. STAT. § 713.29 (2017). In the case of a lien for attorney's fees, readers are directed to requirements set out in case law. *See Sinclair, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1385 (Fla. 1983) (the right to assert such lien with no special requirement other than timely notice to the defendant); *Daniel Mones*, *P.A. v. Smith*, 486 So. 2d 559, 561 (Fla. 1986) (the information aspect may be by filing a notice of lien with the court or include in the original action).

Problem 8-2

Oscar's daughter is getting married in two weeks and is in search of a musician to sing at the wedding. Oscar contacted Allen, a seasoned opera singer, and they enter into a written contract where Allen will sing at the wedding ceremony for $500. A few days before the wedding, Oscar heard Allen coughing in church (Allen is in the choir). Alarmed that Allen may be unable to sing at his daughter's wedding for catching a cold, Oscar called Allen and to ask if he is healthy enough to perform or if he is planned to breaching their contract. Somewhat startled, Allen assured Oscar that he was as healthy as ever and would see him at the wedding. Was Oscar unreasonable by asking Allen if he would miss the wedding? Would the answer differ if the day after the church services, Oscar had seen Allen in the waiting room of a specialist doctor for maladies of the ears, nose and throat? *See Carolina*

Consulting Corp. v. Ajax Paving Industries, Inc. of Florida, 86 So. 3d 502 (Dist. Ct. App. 2d 2012) (quoting Restatement (Second) of Contracts § 251(1) that "[w]here reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the oblige a claim for damages for total breach [of contract], the oblige may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.").

Problem 8-3

Thompson entered into a contract with Motors Corp. to buy 100 small motors to be used by Thompson in his Christmas display at his home. This included motorized reindeer, a waving hand for the Santa Claus figure, and similar motorized applications. The motors were to be delivered by Motors Corp.'s own truck by the end of the following week. A few days prior, Thompson learned of a cold front that was moving his way that threatened to blanket the area with a foot of snow. Fearing delay, Thompson faxed Motors Corp. demanding confirmation of delivery before close of business on the date for delivery. When Motors Corp. did not call or send a return fax by the next morning, Thompson called to cancel the contract and proceeded to buy the motors from a nearby supplier. Would Thompson be justified in doing so? Would it matter if the buyer was not an individual, but a manufacturer of a consumer product, which contract was for 100 motors per month for a year? *See* FLA. STAT. § 672.609 (2017). Would it be different if Thompson was a blender manufacturer who regularly ordered motors from Motors Corp.? *See* FLA. STAT. § 672.609(2) (2017).

CMM Approach: Coverage of breach affords a unique opportunity to contrast two important concepts: breaches of contractual obligation and breaches of condition (covered in Chapters XVII - XIX). As a recommendation, careful and consistent use of terminology may prove to be a helpful memory tool. If a contractual party fails to fulfill a contractual obligation when it is due and there are no legal or equitable excuses (these excuses will be addressed primarily but not exclusively in Chapters XXIV – XXVI on defenses), there is a *breach of contract*. If a condition is interposed between a contractual obligation and the duty to fulfill it, and that condition is not satisfied, there is a *failure of condition*. If a painter agrees to paint an owner's house according to professional standards, and then fails to do so, there is probably a contractual breach and owner may not have to pay (or at least, to pay less). If the owner includes a condition that payment would only be made if she were satisfied with the painter's work, and that work was substandard, the owner's obligation to pay would not arise for the failure of condition.

Hopeful future mergers and acquisitions and transactional lawyers are encouraged to take this lesson to heart. Major contracts such as company mergers, stock swaps, etc., often contain one long section listing “Conditions,” and another entitled something like “Representations and Warranties.” Those items in the first group are either satisfied or fail – and either prevent formation of, or cut off, an obligation. The latter are either honored or breached – and in the case of the latter, allow damages for the breach but not necessarily the complete immunity from obligation as would be the case of an obligation established by a condition. Stated another way, the first group contains absolutes, and the second group contains rights (and duties on the other party, of course) that are more flexible and afford some remedy for reduction but not removal of obligations of the non-breaching party.

CMM Approach: Many doctrinal casebooks opt to forego the specific treatment of *breach*, and this is not without justification. As a doctrinal course, treatment of contract law should begin with significant consideration of *formation*, without which there would be no need to reach questions of *breach*. (With reference to Section A.3. of this Chapter and the *North American Phillips Corp. Inc.* case, the argument of *lack of contract formation* should be considered an *affirmative defense*). Unless there is a formed contract, there are no other questions such as who has the right to assert breach (*third-party rights* – Chapter XXI). Additionally, another more primary question is whether and what a party deserves some form of recovery when things go wrong (*damages*, Chapters IX – XII). Moreover, there may be some reason why obligations of a formed contract many not be asserted – yet (*conditions*, Chapters XVII – XIX), or ever (*defenses*, Chapters XXIV – XXVI). Further, there may be questions about whether prior discussions lead to inclusions of terms in a formed contract (*integration,* Chapter XVI) or what included terms mean (*interpretation*, Chapters XIV – XV). With so many questions of higher primacy to consider, leaving the concept of *breach* for more advanced courses, or leaving it to readers to discern as they advance in knowledge of the law, it is understandable that the approach to *breach* may be relegated to the category of “I know it when I see it.” Perhaps this is why many law school curricula include a course on *damages* or *remedies*. The link between contracts, breach of contract, and the potential right to recovery for breach of contract indicate distinct layers of understanding that take time to integrate. In fact, this is the point being made in the two examples found in the introductory materials to Chapter VII: there are differences between the foci of students and that of practitioners. Have no doubt that with the right commitment of time and effort, things will in fact begin to “click.”

This being said, the question becomes, “what then should be the current focus of understanding with regard to the materials in Chapter VIII?” The following are suggestions. First, it may be helpful to recall and to better understand the

difference between contracts that are express (oral or written), implied-in-fact, and implied-in-law, which are also addressed in Chapter 17. The elements of the implied-in-law kind as found in the *Commerce Partnership 8098 Limited Partnership* case could be committed to memory along with the differences between the three kinds, in addition to recognition in that both claimants and courts sometimes confuse these categories. The notion that courts (not juries and fact-finders) are empowered to select between several formulations of remedy calculation, as described in the *Grossman Holdings Ltd*. case and its use of the Restatement (First) Contracts, should also prove helpful for a rounded understanding of following Chapters on damages. Add to that the fact that damages should be measured at the time of breach, not necessarily at the time when the fluctuation value of a dispute performance is at its peak, which is also introduced in the *Grossman Holding, Ltd.* case. Initial cognizance of U.C.C. Article 2 and its *perfect tender rule* is also revisited in Chapter 19. That a court may consider a claimant's good faith and proper behavior when crafting a remedy, as indicated in the *May* case, adds to notions of good faith addressed most comprehensively in Chapter XII on *Equitable Remedies*. It should go without saying that the premature assertion of *breach*, including the question of possible equivocation (a question of the first order for the topic of *anticipatory repudiation*) and the potential duty to clarify it before triggering a legal dispute (a potential question linked to the one just mentioned depending on the facts) is the quintessentially testable fact pattern for *breach*.

As one is exposed over time to these layers of understanding and the perspective from which they derive (e.g., is it a novice's understanding of a foundational question or a court's assessment of whether there is enough to litigate to a conclusion), the concepts will begin to align – i.e., things will "click." As an example, it is perhaps more important to realize that the first element of a cause of action for breach of contract, set out in the *Baron* case as the existence of a formed contract, requires a solid grasp of formation issues. Which area is more testable on a contracts exam? The formation issues or breach? Which is the focus of a practitioner's decision whether to pursue a breach-of-contract claim on behalf of a client, which subsumes issues of formation?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 8

25. Requirements for bringing breach of contracts claims
26. Breaches as distinguished from conditions and their failure
27. Courts' roles in breach-of-contracts cases
28. Common law breaches and U.C.C. Article 2 *perfect tender rule* breaches

29. Anticipatory repudiation and the right to request adequate assurances
30. Mechanic's liens as security for payment for services

SUGGESTED EXERCISE(S)

(22) Since practical application of contract law has been introduced, have students identify practical state materials available in libraries and through some of the internet research systems.

Chapter 9: DAMAGES

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The subject of damages for breach of contract is rife with overlapping rules, exceptions to general rules, and special cases based on unique facts. It is a daunting task indeed to attempt to cover this topic comprehensively without leaving a few unanswered questions and without failing to identify every similarity or relationship. Accordingly, the following four Chapters will focus on the most important rules with the proviso that some things must be left to further study, including, for example special, rules covered in U.C.C. Article 2 Sales and general Remedies courses. Confusion is the norm in the early stages of study. Efforts to set out the most important topics in the most logical order should help.

We begin with the common law of damages, which fortunately benefits from its chronological position – these came first. It is also important to remember that contract law is constantly in a state of flux, so coverage may entail consideration of "old common-law rules" in contrast to "newer common-law rules." These rules further underlie all "sale-of-goods" rules, which, however, have taken a few forks in the road of development. Important never to forget is the fact that where a

U.C.C. Article 2-based set of rules (FLA. STAT. § 672.201 (2017) *et seq.*) is silent on some matter, it is supplemented by the underlying common-law

rules. *See* FLA. STAT. § 671.103 (2017). Also, sale-of-goods rules often mirror common law ones, with perhaps small differences such as how the test for a rule is applied. Accordingly, sometimes the common-law rule and the sale-of-goods rule is essentially the same. Where it is not, can you see that U.C.C. Article 2 adjustments probably qualify as a "newer" way rather than an older one? This kind of understanding, by the way, may help in the choice of a multiple-choice answer when the right answer is not known – if one must guess, a more modern and commercially-practical answer choice is probably the best one. In the attempt to follow a manageable organization, the special rules for sale of goods are covered primarily in Chapter XI, with occasional cross-reference in Chapters IX and X where it is important to highlight a particular test, point of contrast, or special rule.

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The starting point is the notion that the goal is to afford non-breaching parties with *compensatory* or *compensation damages*, which are those that put the non-breaching party into the position that she would have been in had the contract been fully performed. (If you are looking for an over-arching goal of damages, this is it). Full compensation could entail more than one sub-category of damages, including lost profits on an expected resale, extra costs of shipping or repairs after a breach, or a paid deposit that was part of the breached agreement. Sometimes even a non-breaching party is entitled to more than one sub-category of damage. In certain cases, where a party is not entitled to *legal ("money") damages*, which include all of the ones just mentioned, courts may award in their discretion *equitable damages* such as *specific performance* or *quantum meruit* recovery (addressed *infra* in Chapter XII). While the possibilities are not endless, there are more than several forms, each subject to different rules and depending on the facts and circumstances of a particular case leading to different combinations as part of an award. Important not to forget is the position on "punitive" damages mentioned in this Chapter.

This Chapter addresses the basic common law forms of damage to be awarded in the case of breach. The first form, perhaps because it is the first and simplest to identify and to award, is *restitution*. This may sometimes be included as part of a more sizeable remedy, or it may be the only award possible for reasons such as that the real measure of damages is impossible to formulate or to prove. Take as an example a ticket to a sporting event sold to Buyer who had hoped to resell for triple its face value (and assuming no problem with laws on *scalping*) but the event is cancelled without legal excuse (defenses to enforcement will be addressed in Chapters XXIV through XXVI). The market for tickets to that event may be very uncertain. If the resale price (though Buyer would seek triple the face value) is too uncertain for a court to grant in the case of Seller's breach by cancellation of the event, should not Buyer at least get back the face value already paid? If a sub-contractor pays a good-faith deposit in support of a bid to a contractor but something goes wrong, can you imagine that there may be cases where giving the subcontractor expected profit is not possible or proper, but return of materials left on the job site would be? Return of something from the other contracting party may not be the best award, but it is better than nothing. A return of a deposit is perhaps the quintessential example of *restitution* damage.

There are quite a few concepts to master and information to organize in this Chapter. It may be helpful when reading the materials to hold an outline in mind, organized roughly from least compensatory to most compensatory. The list is restitution damages, followed by reliance damages, then expectation damages (general or "naturally flow" and special "more attenuated," the latter requiring more establishment as described in Chapter X). Note that because they are alternatives, a non-breaching party would be entitled to one form or other, or in appropriate cases some combination (e.g., *restitution* AND *reliance* damages) but not all. Note that profit or receiving the full benefit of one's bargain would only be possible by deposits and/or reliance (at least if they are pre-breach), and so these damages are subsumed into a fully compensatory award.

A quick note on verbiage is in order. For breach of contract, the non-breacher typically suffers damages for which a remedy is sought. It may be helpful to note that the term "damages" is often used interchangeably with "remedies." The goal is to remedy the damages caused by a contractual breach or, stated another way, to seek damages for the damage caused by a breach. *Remedies* also encompasses equitable remedies discussed in Chapter 12.

(23) General Damages

It is not always easy to reconcile concurrently applicable legal rules. There are “legal” damages (this and the following two Chapters) and “equitable” ones (Chapter XII). There are “general” legal damages and “special” ones. “Legal” damages for which recovery may be had take several forms. Though they are effectively the same thing, terms for damages in U.C.C. Article 2 (and the state statutes adopting it) are a bit different, describing damages as “consequential” and “incidental.” Their nature may be “compensatory” or “restitutional.” Then there are exceptions to the award of at least some of these for reasons explored in Chapters X and 11. There are also different formulations that courts apply for the same kind of damage, for example cost to fix a breach involving real estate, or in the alternative, the differential in value of the real estate as promised versus its value as delivered (either the land itself or some improvement to it). There are also distinctions such as the difference between lost profits on a breached contract and the lost profit on a third-party contract. A simple example of the latter could be the loss of a highly profitable contract between a buyer and a retailer which was breached when a manufacturer could not supply components in time for the buyer to honor the contract with the retailer. It is sometimes hard to see that it is all one fabric. Is it fair to charge a breacher with this kind of loss? Chapter X will explore this question.

Sometimes cases lay out important points logically and succinctly, enticing casebook authors to reproduce a case in its entirety rather than to provide a targeted excerpt. The *Grossman Holdings* case is a good example. It is also a Supreme Court of Florida case, making it binding on all Florida courts. *See* Chapter 3. Assess whether, reading this case again in this Chapter, your understanding deepens. Its primary purpose under this heading is to educate as to the ultimate intent of contract law in the case of breach: to put the non-breaching party in as good a position as would have been the case in the absence of breach. The case goes on to indicate some special considerations on the nature of proper recovery in the highly specialized case of construction contracts. There is even discussion of the time at which a damages calculation is to be made – at the time of breach. Finally, the opinion explains the general prohibition on punitive damages in contracts cases (covered in Chapter X) – leaving punishment for bad acts primarily to other areas of law, such as the law of torts. They can be separately pleaded and proved, of course. *See, e.g.,* discussion of the economic loss rule in Chapter 10.

GROSSMAN HOLDINGS, LTD. v. HOURIHAN

Florida Supreme Court,

1982 414 So. 2d 1037

McDONALD, Justice.

We have for review *Hourihan v. Grossman Holdings Ltd.*, 396 So.2d 753 (Fla.3d DCA 1981), which conflicts with *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918), and *Oven Development Corp. v. Molisky*, 278 So.2d 299 (Fla. 1st DCA 1973), regarding the proper measure of damages for breach of a construction contract. We have jurisdiction, article V, section

3(b)(3), Florida Constitution, and disapprove the measure of damages applied by the third district in the instant case.

Late in October 1978 the Hourihans contracted with Grossman Holdings to purchase a house to be built in a planned development. Both the model and the office drawings showed the house with a southeast exposure, and the contract stated that Grossman would construct the house “substantially the same” as in the plans and specifications at the seller's office or as the seller's model. In December a new drawing went on display in the Grossman offices. It showed, among others, the Hourihan's lot and their soon-to-be-built house; unfortunately, the house in the new drawing faced the opposite way from what they expected and wanted.

The Hourihans brought this discrepancy to the attention of Grossman's employees and remonstrated against construction of a mirror image of the house they had contracted for. In spite of the Hourihan's objections, the contractors refused to change their plans and began constructing the house depicted in the December drawing. The Hourihans then sued in circuit court for breach of contract.

After a bench trial, the court found that Grossman had breached its contract. The court refused to award damages, however, finding that specific performance would be economically wasteful and out of proportion to the good to be attained and that the value of the house had increased substantially since the date of the contract. The district court agreed with the trial court's finding that the contract had been breached, but found that it had applied the incorrect measure of damages. Relying on *Edgar v. Hosea*, 210 So.2d 233 (Fla.3d DCA 1968), the third district held that the unreasonable economic waste doctrine does not apply to residential construction. It further found that Grossman's willful and intentional failure to perform according to the plans and specifications nullified its claim of substantial compliance with the contract. The court found the proper damages to be that amount necessary to reconstruct the dwelling to make it conform to the plans and specifications and remanded for a new trial on damages.

Grossman contends that *Bayshore Development* and *Oven Development* state the proper rule for determining the measure of damages for

improperly constructed residences. These cases hold that the proper measure of damages is the difference in value between the building as constructed and as it should have been constructed. Grossman claims that subsection 346(1)(a) of the Restatement (First) of Contracts (1932) supports the diminution of value theory and urges this Court to adopt the Restatement as this state's law regarding damages for breach of a construction contract.

Subsection 346(1)(a)[1] of the Restatement provides as follows:

> a. For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
>
> (a) For defective or unfinished construction he can get judgment for either

> 24. the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
>
> 25. the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

The comment on subsection 346(1)(a) states:

> The purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him; but this does not mean that he is to be put in the same specific physical position. Satisfaction for his harm is made either by giving him a sum of money sufficient to produce the physical product contracted for or by giving him the exchange value that that product would have had if it had been constructed. In very many cases it makes little difference whether the measure of recovery is based upon the value of the promised product as a whole or upon the cost of procuring and constructing it piecemeal. There are numerous cases, however, in which the value of the finished product is much less than the cost of producing it after the breach has occurred. Sometimes defects in a complete structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste. If no such waste is involved, the cost of remedying the defect is the amount awarded as compensation for failure to render the promised performance.

Subsection 346(1)(a), therefore, is designed to restore the injured party to the condition he would have been in if the contract had been performed. This aim corresponds with general Florida law. *See Campbell v. Rawls*, 381 So.2d 744 (Fla. 1st DCA 1980); *Lake Region Paradise Island, Inc. v. Graviss*, 335 So.2d 341 (Fla.2d DCA 1976). We adopt subsection 346(1)(a) as the law in Florida regarding breaches of construction contracts.[2]

Applying subsection 346(1)(a) to the instant case, we find that the district court reached an incorrect conclusion. The subsection itself makes no distinction between residential and nonresidential construction. Indeed, the illustrations contained in the Restatement deal with both types of buildings. We disagree with the district court's conclusion that the rule as enunciated in subsection 346(1)(a)(ii) is applicable only to commercial buildings.[3]

Grossman also complains that the district court's ruling awards damages that are punitive in nature. Punitive damages are not recoverable for breach of contract, but where the acts constituting the breach also amount to a cause of action in tort, punitive damages may be recovered. *Nicholas v. Miami Burglar Alarm Co.*, 339 So.2d 175 (Fla.1976); *Griffith v. Shamrock Village, Inc.*, 94 So.2d 854 (Fla.1957). The Hourihans, however, presented only the breach of contract issue to the district court. The amount of compensatory damages flowing from a breach of contract is not affected by the manner of the breach.

Turning to the trial court's judgment, we agree in part and disagree in part with its findings. The record supports the trial court's finding that reconstructing the house would result in economic waste, and we will not disturb this finding. On the other hand, we find the trial court's refusal to consider awarding damages because of the then-current value of the house to be incorrect.

Damages for a breach of contract should be measured as of the date of the breach. *National Communications Industries, Inc. v. Tarlini*, 367 So.2d 670 (Fla. 1st DCA 1979); *Lake Region Paradise Island, Inc. v. Graviss*, 335 So.2d 341 (Fla.2d DCA 1976). Fluctuations in value after the breach do not affect the nonbreaching party's recovery. Here, it may be possible to demonstrate a difference in value as of the date of delivery between the house the Hourihans contracted for and the house that Grossman built. If such difference exists, the Hourihans should have the opportunity to prove it on remand and recover that amount as damages.

We therefore disapprove the measure of damages applied by the district court, but we agree that the case should be remanded for a new trial on damages.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur.

ALDERMAN, J., dissenting:

I would approve the decision of the District Court of Appeal.

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[1] Similar provisions are contained in Restatement (Second) of Contracts § 348(2) (1981), but we prefer the language in Restatement (First).

[2] Several Florida courts have issued opinions which, in essence, apply subsection 346(1)(a), but without mentioning the Restatement. *Temple Beth Sholom v. Thyne Constr. Corp.*, 399 So.2d 525 (Fla.2d DCA 1981); *Deltona Corp. v. Jannotti*, 392 So.2d 976 (Fla. 1st DCA 1981);

Gory Associated Indus., Inc. v. Jupiter Roofing & Sheet Metal, Inc., 358 So.2d 93 (Fla. 4th DCA 1978); *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla.3d DCA 1977).

[3]Restatement (First) of Contracts § 346 illustration 2 (1932).

Notes

20. This Florida Supreme Court case is a good one to remind about reasons when the Supreme Court accepts jurisdiction to hear a case. One of those times is where it is important to reconcile a split in law between the District Courts of Appeal for which clarification, and a single approach, is important. *See, e.g., Sebo v. American Home Assurance Co.* (deciding a split between use of the "concurring cause" doctrine utilized by the Third District Court of Appeal in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Dist. Ct. Fla. 3d, 1988) and the use of "efficient proximate cause" doctrine in the Second District Court of Appeal's ruling in *American Home Assurance Co. v. Sebo*, 141 So. 3d 195 (Dist. Ct. Fla. 2d, 2013)). The competing causation theories are not critical to this Chapter – resolution of their conflicting tests is the point of this note. The hierarchy of court decisions was addressed in the Introduction.

21. This case also provides opportunity to remind that there is a Restatement (First) Contracts as well as an amended and supplemented Restatement (Second) Contracts. As noted in the Introduction to this Chapter, the law is constantly in a state of flux, and there may be jurisdictions that still follow "the old way" (possibly, the First Restatement) where others follow "the new way" (possibly, the Second Restatement). The case further provides the opportunity to point out that the casebooks typically remove footnotes from the original cases as unnecessary, but include them where it makes an important point. The footnotes in the *Grossman Holdings, Ltd*. case are in the original opinion. In this case, it is the fact that there is an "old way" as well as a "new way" and this Court opted to work from the earlier one.

In preparation for organizing compensation damages, you may want to ask three questions. First, is there something conveyed to one party who after breach no longer should keep it, such that it be restored? Second, was there some aspect to the agreement, such as renting a moving van to deliver an item as a good or as part of a service such as catering, that a party bound itself to in reliance on the underlying bargain – which should be compensated? Third, what is the lost profit on the contract (*general*), or the lost value from a really great sales price (*general*), or even the loss on a third-party contract *(special*) caused by the breach of the contract under consideration? It may be helpful to review and to work into one's outline the damages provisions of the Restatement (Second) Contracts §§ 347-49.

CMM Approach: As will be reiterated a few times throughout, it is wise to remember the difference between memorization and understanding. You may be faced with a question that you have never thought of before, and are therefore faced with several possibilities that all seem valid. This is where understanding improves the chance of selecting the right option, or at least organizing several options in the proper hierarchy of best to worst. There are two public policies buried in the last case that support two important legal rules. One may memorize the rules, but understanding the policies behind them is likely to lead to a correct, or at least a better, answer. First, the *Grossman Holdings, Ltd*. case indicates that contract law does not recognize punitive damages. The goal is to put a non-breaching party in the position that she would have been in had the contract been fully performed – which makes no room for windfall gains or recovery for bad faith/mean-spiritedness. Thus, if a non-breaching party seeks more than the value had a contract been properly performed, such party had better justify any extra amount, either a windfall or sums by way of penalty to the breaching party, by the separate pleading and proving a claim from another

area of law such as tort law or consumer protection law. Second, the *Grossman Holdings, Ltd*. case also indicates that damages are to be calculated at the time of breach and not at other potentially opportune times in the case of fluctuating values. Certainly, a frustrated home buyer may want to secure recovery at the last possible moment if housing prices are rising, for example. But here is where public policy comes in – when is the best time to lock in damages when one of the goals is to have the non-breaching party make accommodation (e.g., buying another home, or securing a supply from a different manufacturer)? Should the non-breaching party think about waiting, if the value of damage would appear to go upward? And if so, should this be countenanced by contract law and practice?

15. Restitution

This is one of the possible "general" damages – the kind that naturally flow from a breach. If a homeowner breaches a contract for paving services, the contractor may want the bricks back if they have already been delivered to the job site. If someone pays a deposit and there is a breach, and the other forms of damage are too speculative (addressed further in Chapter X) or otherwise immeasurable, at least that person could get the deposit back.

OCEAN COMMUNICATIONS, INC. v. BUBECK

District Court of Appeal of Florida, Fourth

District, 2007 956 So. 2d 1222

TAYLOR, J.

Plaintiffs, Ocean Communications, Inc. and Olympusat, Inc., appeal a final judgment denying their claim for restitution of monies paid to Defendants, Robert Bubeck and Market Link of South Florida, Inc., in this action for breach of contract. The trial court found that defendants materially breached their contract with plaintiffs but ruled that plaintiffs were not entitled to restitution because there was an express contract between the parties. Because we conclude that plaintiffs properly sought restitution under their amended breach of contract count, we reverse and remand for a determination of the amount of restitution, if any, owed to plaintiffs.

On October 26, 1997, plaintiffs entered into an agreement with Robert Bubeck. Under the terms of the agreement, Bubeck was to work as an agent for plaintiffs to find "remnant time" on TV networks to sell to infomercial and shopping networks or other programming channels. Bubeck was to receive twenty-five percent commission on net profits on those deals.

On December 27, 2000, the parties entered into a second agreement, whereby Bubeck would work as an independent contractor for plaintiffs to

coordinate advertising sales for the company and develop an infomercial network. Bubeck was to be compensated with a monthly salary, equity in the company, and commission on the advertising sales and on the profits from the infomercial network. The agreement further provided that Bubeck was to “phase out” over the year his consulting responsibilities with CN8.

Plaintiffs filed a complaint against defendants for injunctive relief for breach of non-competition agreements, [Footnote omitted] money damages for breach of contract, and unjust enrichment. Under the unjust enrichment claim, plaintiffs asserted that Bubeck and his company, Market Link of South Florida, Inc., were unjustly enriched by plaintiffs' payments to them in the sum of

$387,805.33 under the agreement between December 27, 2000 and November 4, 2002. Plaintiffs demanded a judgment of restitution in this amount.

At trial, the parties stated that they had stipulated to a number of issues, and plaintiffs contended that only one major legal issue remained: “whether or not they're entitled to restitution when there's a contract.” In closing arguments, plaintiffs stated that they were pursuing a breach of contract claim, seeking return of $17,000 to $22,000. In addition, they sought recovery for unjust enrichment. Ocean stated its position regarding the unjust enrichment claim as follows:

> That the major function that Mr. Bubeck had been retained to perform underneath the terms and conditions under the second agreement, was to produce advertising revenue for this new creature, Olympusat. He didn't do that. He was paid a fairly handsome monthly stipend, I think that started out $4,000 and then went to 7,000 and went to 10,000. The proof has been, and I think he admitted that he has received, in terms of monthly salary in round numbers, about a total of $176,000.

Plaintiffs sought return of the $176,000 paid in monthly salary. The trial court rejected plaintiffs' argument, reasoning that that there could be no recovery for unjust enrichment when there is an express contract. Thereafter, plaintiffs moved to amend their contract damages claim to state a claim for $176,000. The court granted the motion.

In its final judgment, the court found that plaintiffs had cause to terminate Bubeck for violation of the 2000 agreement by continuing to pursue personal business, which was prohibited by the agreement. The court concluded that Bubeck had breached the 2000 agreement by competing with plaintiffs and receiving money that was owed to plaintiffs. The court found, however, that plaintiffs were not entitled to restitution, “as restitution is an equitable remedy, and there is an actual contract between the parties in this case.” Instead, the court found plaintiffs to be due $7,000 received by defendants in 2002. The court further found that although plaintiffs were discharged from making payments under the 2000 agreement once Bubeck had breached the agreement, plaintiffs were still responsible for making payments under the 1997 letter agreement. Pursuant to the 1997 agreement, the court found defendants to be due $93,607. The court concluded the final amount due to defendants to be $86,607 ($93,607 less $7,000).

Plaintiffs argue that the trial court erred when it found that Bubeck materially breached the parties' contract but concluded that restitution was not an available remedy. Whether restitution is an equitable remedy not awardable for breach of an express contract is a question of law which we review *de novo. See Bell v. Indian River Mem. Hosp.*, 778 So.2d 1030, 1032 (Fla. 4th DCA 2001) (holding that review of a question of law is *de novo*).

In *Beefy Trail, Inc. v. Beefy King International, Inc.*, 267 So.2d 853, 856 (Fla. 4th DCA 1972), we recognized three distinct remedies for breach of contract: damages, restitution, and specific performance. We explained the distinction between a damages remedy and a remedy of restitution thusly:

> The purpose of damages is to put the injured party in as good a position as he would have occupied had the contract been fully performed. In this context the injured party is considered to be "affirming" the contract. The purpose of restitution, however, is to require the wrongdoer to restore that which he has received and thus tend to put the injured party in as good a position as he

> occupied before the contract was made; in this context the injured party may be said to have considered the contract as "terminated" or "ended."

Id. at 857; *see also McCray v. Murray, 423 So.2d 559, 561* (Fla. 1st DCA 1982) (holding that where there is a total breach of contract the plaintiff may elect between a remedy that " 'will put him in the same position as he was immediately prior to making the agreement' " and one that "will place him in the position he would have been if the contract had been completely performed") (quoting Sundie v. Lindsay, 166 So.2d 152, 153 (Fla. 3d DCA 1964)).

Defendants correctly state that a plaintiff cannot pursue an equitable theory, such as unjust enrichment or quantum meruit, to prove entitlement to relief if an express contract exists*. See, e.g., Kovtan v. Frederiksen*, 449 So.2d 1, 1 (Fla. 2d DCA 1984) ("It is well settled that the law will not imply a contract where an express contract exists concerning the same subject matter."); *In re Estate of Lonstein*, 433 So.2d 672, 674 (Fla. 4th DCA 1983) (same). A contract implied in law, or "quasi contract," operates when there is no contract "to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation*." Commerce P'ship. 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So.2d 383, 386 (Fla. 4th DCA 1997).

Restitution is available as a type of recovery, however, when there has been a breach of an express contract. Indeed, we stated in *Beefy Trail* that proof of breach of contract is a necessary element of restitution:

> This determination [of a restitutionary interest] is dependent upon the existence or nonexistence of any evidence relating to a material breach because demonstration of such a breach is a prerequisite under the restitution theory.

267 So.2d at 857 (*citing* CORBIN ON CONTRACTS, Vol. 5, §. 1104); *see also 1226 Timberland Consol. P'ship. v. Andrews Land & Timber, Inc.*, 818 So.2d 609, 611 (Fla. 5th DCA 2002) (a party to a contract who justifiably refuses

to perform because his duties have been discharged by the other party's breach may seek restitution for any benefit he has conferred by part performance in excess of loss caused by his breach); RESTATEMENT (SECOND) OF CONTRACTS § 373 (“[O]n a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.”).

Plaintiffs argue that defendants have misstated the issue on appeal to be whether an express contract bars an unjust enrichment claim. They point out that the trial court permitted them to amend their breach of contract claim at trial to conform to the evidence, and that they sought restitution for the compensation they paid to defendants under the amended breach of contract claim, not under their count for unjust enrichment.

Defendants counter that, even if restitution were an available remedy, it is impossible to grant such relief because there is no way that plaintiffs could return the benefits they reaped from defendants' part performance. In *Beefy Trail*, we stated:

> if restitution is sought the plaintiff must return to the defendant any part performance of value rendered by defendant; such part performance must be allowed as a credit to the defendant as against the amount alleged owed to the plaintiff as restitution for the breach.

267 So.2d at 858. Citing this case, plaintiffs argue that defendants should be credited only with the reasonable value of their performance. The trial court did not make any findings regarding the value of defendants' services between the time of the breach and November 4, 2002, the date after which there was no breach, according to the final judgment. On remand, the trial court can hold an evidentiary hearing to determine the value of defendants' services, which can be used to offset plaintiffs' restitutionary recovery.

Reversed and Remanded.

STEVENSON, C.J., and POLEN, J., concur.

Notes

15. The opinion in *Ocean Communications, Inc.* again raises the issue of equitable damages as a possible remedy and adds one to the list (addressed in Chapter XII: *unjust enrichment*). What the opinion works to make clear is whether *restitution* is a “legal” remedy or an “equitable” one. In fact, it can be either, distinguished from each other based on the nature of the claim and how that kind of claim was treated at common law. In one of the paragraphs, the court indicated that it was not proper to grant equitable damages in the case of express contracts (i.e., where there should be “legal” damages). Though equitable damages are covered in Chapter XII, this is a good opportunity to highlight the preference for legal damages where available, with resort to equitable damages only if there are no legal ones.

16. Appellate courts have unique jurisdiction. Although best left to other courses such as Civil Procedure, a quick note on *deferential* and *de novo* review may prove helpful. Where in a court of original jurisdiction the jury (or trial court in a bench trial) makes a finding of

fact, such as after assessing the honesty of the parties and witnesses, appellate courts pay significant deference to the findings. The chance to assess the credibility of the parties and witnesses does not exist at the appellate level. However, court rulings such as on admission or exclusion of evidence are made as a *matter of law* and not as a *matter of fact*. Appellate courts may review decisions made as a matter of law without a deferential standard, i.e., *de novo* or "anew, afresh."

Problem 9-1

Franchisee wished to be the first franchise granted by a brand new Franchiser hoping to build a worldwide network in a brand new industry. Since it was a new industry, no one had ever engaged in that business and there was no track record of size, growth, expected profits, and losses, etc. (What these facts are imputing is addressed in Chapter X). Franchisee paid a $10,000 up-front

franchise fee just before Franchiser ceased operations. What is the likely best form of damages that Franchisee should claim?

Problem 9-2

Contractor promised to build a new patio for Homeowner before the end of summer for $3,000 total (materials included). Contractor purchased patio tiles for the project and had them delivered to the location. Due to injury to several of its workers, Contractor was unable to complete the project on time. Homeowner paid a different contractor $4,000 for a patio done within a week after Contractor's breach, and using a different patio tile. What is the likely best form of damages that Homeowner should claim? Is there anything to which Contractor may be entitled? What is the difference here?

16. Reliance Damages

With apology, we want to make a point that is a bit subtle and may be a bit confusing at first. There are "general" damage "reliance damages" addressed immediately below, and there is also equitable form of reliance damages, or damages for *detrimental reliance*, covered in Chapter XII and alluded to briefly in Chapter 10. The cases that follow demonstrate the nature of damages alternatives (you can't get all kinds simultaneously) and that all damages, including reliance damages, must be proved by the party seeking them. Recall the need for proving actual damages from Chapter 8.

RESORTS INT'L, INC. v. CHARTER AIR CENTER, INC.

District Court of Appeal of Florida, Third

District, 2013 503 So. 2d 1293

NESBITT, Judge.

Resorts International, Inc. (Resorts) and GB Management Ltd. (GB) appeal from the entry of an adverse final judgment. We affirm the entry of judgment as to Resorts' and GB's liability for breach of contract but reverse the award for damages.

In 1978, Resorts purchased a Bahamian Casino in Freeport. At that time, Charter Air Center, Inc. (Charter) was providing flight service to the casino for gambling junkets. Resorts negotiated with Charter through Charter's president, William Cousins, for a junket flight program. Since Mackey Airlines (Mackey) enjoyed certain required Civil Aeronautical Board certifications which allowed it to operate flights to Freeport more freely, Resorts encouraged Charter to acquire operational and managerial control over Mackey. At the time, Mackey had filed for chapter 11 bankruptcy protection. Resorts also encouraged Charter to acquire additional aircraft in order to accommodate an anticipated increase in flight service requirements.

As part of the agreement, Resorts planned to provide Charter with a financial guarantee of up to

$8.5 million for the purchase and lease of an aircraft. The aircraft was to be used at night for Resorts' junket flights, but Charter would have been free to use it at all other times for its regularly scheduled commercial flights. Resorts sent Charter a letter of its intent to provide a financial guarantee, dated June 21, 1979, to be used in arranging credit for the purchase of an aircraft. Subsequently, Resorts informed Charter that the financial guarantee would have to be reduced to

$6 million. Upon the representations made to Charter by Resorts, Mr. Cousins proceeded with the expansion of Charter and attempted to obtain additional aircraft.

Charter entered into a written contract with Resorts' subsidiary, GB, on August 1, 1979, whereby Charter agreed to fly, and Resorts agreed to use, a minimum number of flight hours per month with certain specified aircraft until December 31, 1987 or until GB ceased to operate a casino in Freeport. In consideration, Resorts was to pay Charter the cost of this operation plus fifteen per cent.

On September 12, 1979, Resorts advised Charter that problems had arisen with respect to the guarantee and proposed a new rate schedule to be used until the financial guarantee was forthcoming. Charter agreed to operate under the new schedule until the guarantee could be obtained.

Eventually, Resorts' use of Charter's services tapered off and the guarantee was never obtained. Charter brought suit for breach of contract alleging that Resorts failed to use Charter's services as required by the contract. The trial court entered a partial summary judgment. Since GB ceased operating the casino on September 25, 1983, the court limited proof of damages for prospective loss of profit to the losses sustained up until that date. The judge returned a verdict for Charter finding specifically that it had sustained: $450,000 lost profits; $1,200,000 of damage as a result of expenses related to acquiring CAB certifications; losses of $450,000 associated with salvaging Mackey; and, a $258,000 loss which resulted from the purchase and sale of an airplane that was to be used to service Resorts.

* * *

The trial court also erred in awarding Charter damages for both its lost profits *and its expenditures made in reliance upon the contract. (Emphasis added)*. A party is entitled to recover, as against the breaching party, the profits lost as a result of the breach (footnote omitted) or, in the alternative, the non-breaching party may treat the contract as void and seek to recover those expenditures made in reliance upon the performance of the contract. *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 267 So.2d 853 (Fla. 4th DCA 1972). These measures are alternate remedies and "[o]ne method of ascertaining damages is exclusive of the other It is incorrect for evidence to be introduced as to

both methods, the injured party must make an election in regard to which method he seeks to recover, and pursue that method only." *Sundie v. Lindsay*, 166 So.2d 152, 153 (Fla. 3d DCA 1964); *see also Beefy Trail, Inc.*, 267 So.2d at 853.

Finding that the trial court erred in awarding damages for both Charter's expectation of profit and reliance costs and for damages suffered by a nonparty, we reverse the award and remand for a new trial on the issue of damages. We affirm the judgment under review with respect to Resorts' and

GB's liability, finding that the verdict is supported by the evidence and that the trial court correctly admitted evidence pertaining to Resorts' guarantee to Charter. Accordingly, we

Affirm in part, reverse in part, and remand for further proceedings.

Problem 9-3

Contractor signed a deal with Condominium to put a new roof on a large building of 10 stories. After signing, Contractor agreed with CraneCo to rent a large crane (non-refundable) for the two weeks needed to put on the new roof. As it turns out, the agreement with Condominium was bad for Contractor, who would lose $50,000 if it fully and properly honored the contract. No deposits were paid. What is the likely best form of damages that Contractor should claim? Would it be different if Condominium was the breaching party?

The cost of replacement services is a possible form of expectation (in fact, general) damage. As you read the excerpt that follows, ask yourself what the result may have been had *MCI World Network Services, Inc.* actually rented another company to field its calls to replace the calls lost on the damaged line. The decision rests upon a matter of proof, but not as to the possibility, of the cost of replacement services.

MCI WORLD NETWORK SERVICES, INC. v. MASTEC, INC.

Supreme Court of

Florida, 2008 995 So. 2d

221

* * *

FACTUAL AND PROCEDURAL HISTORY

Mastec, an excavation company, inadvertently severed one of MCI's underground fiber-optic cables in downtown Miami, and the cable was not repaired until ninety-seven hours later. However, MCI did not suffer a disruption of its service because it was able to redirect the telecommunications traffic from the damaged cable to other cables in its system. As a result, MCI avoided any loss of profits.[1] MCI claimed compensatory damages in the amount of $23,000 for the cost of repairs, loss-of-use damages in the amount of $868,000, and punitive damages. The loss-of-use damages claim was based upon the amount that MCI claims it could have paid, but did not, to rent the use of an equivalent substitute cable from another telecommunications company for the time reasonably necessary to make repairs. The district court found against MCI on its loss

[1] As an aside, do you recall the necessary elements of a contract claim described in Chapter VIII? It could have been a factor in this case. Perhaps the court did not fully understand the law. More likely is that the parties' pleadings set the stage and the court proceedings followed.

of use damages claim. The Eleventh Circuit found that this case raised unsettled questions of Florida tort law and certified the two questions presented.

* * *

However, in this telecommunication services case, MCI has not demonstrated that it is possible to determine the flow of calls to a particular cable in a system of cables where there has been no loss of service and thus no loss of revenue. Because MCI did not actually suffer the loss of use of its telecommunications service, damages for loss of use measured by the rental replacement value would result in a windfall to MCI. Any damages to MCI based on rental replacement are purely theoretical. Consequently, we find persuasive the majority of cases which deny loss-of-use damages for rental of replacement cable when there has been no rental because they further the goal of awarding damages in an amount equal to the loss sustained. *See, e.g., MCI Worldcom Network Services, Inc. v. OSP Consultants, Inc.,* 266 Va. 389, 585 S.E.2d 540, 544 (2003).

CONCLUSION

For the foregoing reasons, we answer the reworded certified question in the negative and hold that loss-of-use damages based on rental replacement value is not the appropriate measure of damages when there have been no such damages incurred and the telecommunications traffic carried by the damaged cable has been accommodated within the telecommunications carrier's own network so there has been no loss of service. We return this case to the United States Court of Appeals for the Eleventh Circuit for further proceedings.

It is so ordered.

QUINCE, C.J., and ANSTEAD, PARIENTE, CANTERO, and BELL, JJ., concur.

LEWIS, J., concurs in result only with

an opinion. WELLS, J., recused.

LEWIS, J., concurring in result only. [Text of reasons for dissent omitted].

Notes

a. An important aspect of the *Resorts Int'l, Inc.* opinion is the fact that legal damages for breach of contract are typically in the alternative. This is not to say that there may be unique cases that might allow for recovery of multiple forms of legal damage. *Consider* Problems 9-4 & 9-5 that follow.

b. Why would a non-breaching party, or a court determining damages, opt for restitution or reliance damages, when expectation damages seem to be the optimal solution? What if the contract was a losing proposition for the non-breaching party? If profits would be negative, they would not be awardable. Thus, not only are restitution and reliance damages possible where it is impossible to ascertain a right to expectation damages, but these other forms

may also be higher than expectation damages under certain circumstances. Note however that if there were some level of expectation damage and also a claim for reliance damages, only one of these would be possible since these are mutually exclusive alternatives. *See. e.g.*, *State Dept. of Corrections v. Brooks*, 891 So. 2d. 1 (Dist. Ct. App. 1st 2005). If someone receives full lost profits that included some reliance expense, then loss of that reliance expense is expected in order to gain the profits - thus to give a party both would be to afford a windfall.

Both cases excerpted above raise the issue of an election of remedy. It is also mentioned in the *HCA Health Services of Florida, Inc.* case excerpted below. As readers are now aware, there are more than a few forms to remedy breachs of a contract (including equitable ones addressed in Chapter XII). Not fully unlike the duty to raise defenses in a first responsive pleading at the risk of losing the right to assert them later (*see* Chapter XXIV), claimants can lose the right to make remedy claims that they do not assert and maintain throughout the proceedings. It would lead to the waste of significant judicial and other resources if proceedings follow the path toward a particular remedy only to have a late switch in theory for another kind of remedy. This is particularly but not exclusively true when the split is between legal and equitable damages. Thus, where a claimant pursues a particular theory to the exclusion of others, that claimant has *elected* to follow that remedy only. A court may exclude later requests for a different remedy.

CMM Approach: As a practical matter, but without encouraging ill-conceived, scattershot argumentation, lawyers should argue for every kind of damage that may reasonably be awarded under the facts and circumstances. As the legal process moves forward in the pre-trial period, the parties through counsel may narrow the focus of their remedies. In short, it is wise to request any legal or equitable damage that may be justified in a particular case at the beginning, and only drop some of those forms as the proceedings make clear are not likely or appropriate.

17. Expectation Damages

Measured at the time of the making of a contract, what is the best calculation of damages to put the non-breaching party in the position that would have been reached had the contract been fully performed? Lost profits that would have been made on a services contract? The “savings” that a homeowner would have enjoyed after paying a higher-priced contractor due to the non- performance by a lower-priced contractor with whom homeowner had already contracted? What about the difference between the sales price of a house had it been properly remodeled from the sales price as actually remodeled? The nature of the proper expectation damage depends on the unique facts and circumstances involved. To provide some breadth of understanding, this section will set out a variety of *expectation* damage examples. Where these are awarded, typically the other two (expectation or legal) are not, though there may be exceptions such as with a refundable deposit.

5. Lost Profit on Two-Party Contract, Possible Lost Rental Costs (General)

HCA HEALTH SERVICES OF FLORIDA, INC. v. CYBERKNIFE CENTER OF TREASURE COAST, LLC

District Court of Appeals for the Fourth

District, 2016 204 So. 3d 469

TAYLOR, J.

Appellant, HCA Health Services of Florida, Inc., d/b/a St. Lucie Medical Center (the "Hospital"), appeals an amended final judgment awarding the plaintiff/appellee, CyberKnife Center of the Treasure Coast, LLC ("CyberKnife"), $1,842,392 in damages for lost revenue on CyberKnife's claim for breach of contract, together with prejudgment interest and costs. We reverse the final judgment, concluding that lost revenue was an improper measure of damages, and appellee offered no proof at trial regarding the correct measure of damages.

In March 2007, CyberKnife and the Hospital entered into the CyberKnife Services Agreement for a term of five years. Under the Agreement, CyberKnife was required to provide "the Equipment and the Site" to the Hospital for CyberKnife radiosurgery treatments to patients of the Hospital. In exchange, the Hospital would pay CyberKnife $5,150, plus sales tax of $334.75, "per-click" for each treatment rendered to a patient. The site was to be staffed and "operated exclusively by" the Hospital, but CyberKnife was responsible for maintenance of the equipment. The Agreement stated that "in no event shall either party be entitled to consequential or punitive damages."

Before the parties reached a written agreement, they hired an independent expert to perform a fair market valuation ("FMV") of the CyberKnife treatments under the parties' proposed business agreement. The FMV included volume projections and estimates of the number of treatments per patient.

On or about January 25, 2008, the Hospital notified CyberKnife that it was terminating the Agreement. Notably, federal regulations implementing the Stark law (footnote omitted) later made so-called “per-click” agreements illegal as of October 1, 2009. *See* 42 C.F.R. § 411.357(b)(4)(ii)(B) (2009).

Litigation ensued following the Hospital's termination of the Agreement. At trial, CyberKnife's damages expert testified to his damages calculations under various scenarios. In one scenario, the expert relied upon the original volume projections in the FMV report and opined that CyberKnife's lost revenue was $1,842,392, between January 25, 2008 (when the parties' contract was terminated) and October 1, 2009 (the effective date of the change in the Stark law regulations).

After CyberKnife rested, the Hospital moved for an involuntary dismissal, raising the same arguments it now raises in this appeal. The Hospital renewed its motion for involuntary dismissal at the close of all the evidence. The trial court denied the Hospital's motions for involuntary

dismissal and later entered judgment against the Hospital in the amount of $1,842,392 on CyberKnife's claim for breach of contract, plus prejudgment interest and costs.

On appeal, the Hospital's primary arguments concern damages issues. The Hospital argues, as it did below, that the consequential damages waiver in the parties' contract barred the damages CyberKnife sought, and that CyberKnife failed to submit any proof on the proper measure of damages, which was lost profits. Although we conclude that CyberKnife's damages were general damages rather than consequential damages, (footnote omitted) we agree that CyberKnife failed to present evidence of the correct measure of its damages—lost profits.

A trial court's determination as to the method of calculating damages is reviewed *de novo*. *Katz Deli of Aventura, Inc. v. Waterways Plaza, LLC*, 183 So.3d 374, 380 (Fla. 3d DCA 2013).

Where a party's repudiation of the contract prevents performance by the non-breaching party, the non-breaching party "may elect between reliance damages (those costs and expenses of preparing to perform, the recovery of which will place the recipient in the position it occupied before entering into the contract) or lost profits (the benefit of the bargain or 'expectation interest')." Del Monte Fresh Produce Co. v. Net Results, Inc., 77 So.3d 667, 673 (Fla. 3d DCA 2011). Unless the non- breaching party elects reliance damages, "Florida law requires proof of lost profits (income less expense) rather than merely lost gross revenue." Id. at 673 n. 11. In a lost profits case, the proper computation of damages "requires the non-breaching party to deduct from anticipated contract revenue the costs incurred in performing the contractual services." Id. at 674. "Typically these include an appropriate allocation of overhead as well as any personnel expenses that would have been incurred." Id. Evidence pertaining to loss of income or gross receipts, without specific evidence concerning expenses, is inadequate to prove lost profits. E.T. Legg & Assocs., Ltd. v. Shamrock Auto Rentals, Inc., 386 So.2d 1273, 1274 (Fla. 3d DCA 1980).

Here, CyberKnife did not present evidence of its reliance damages or its lost profits, but instead merely proved its lost revenue. CyberKnife nevertheless argues that lost revenue was a proper measure of damages in this case

because the lost revenue consisted of unpaid rent under a lease agreement. We disagree.

In the landlord-tenant context, a lessor's damages are generally measured by “the difference between the rentals stipulated to be paid and what, in good faith, the landlord is able to recover from a reletting.” *Kanter v. Safran*, 99 So.2d 706, 707 (Fla.1958) (citations omitted). We find, however, that this measure of damages is inapplicable to the case at bar. Although the CyberKnife Services Agreement has some characteristics of a lease, it is not merely a lease. The Agreement also involved the provision of services. Moreover, because the payment structure was conditioned upon anticipated treatments with third-party patients, there was no stipulated rent under the Agreement, as there would be in a typical lease. In fact, the Agreement does not refer to itself as a “lease” or to the payments thereunder as “rent.” Accordingly, we conclude that lost profits, not lost revenue, is the correct measure of expectation damages in this case.

Finally, because there was no proof at trial concerning the correct measure of damages, we reverse and remand for entry of judgment in favor of the Hospital. *See Teca, Inc. v. WM–TAB, Inc.*, 726 So.2d 828, 830 (Fla. 4th DCA 1999) (where there has been no proof at trial concerning the correct measure of damages, a plaintiff is not entitled to a second opportunity to prove damages and

judgment should be entered in favor of the defendant*); see also Morgan Stanley & Co. v. Coleman*, 955 So.2d 1124, 1131 (Fla. 4th DCA 2007) (same). This disposition renders the remaining issues moot.

Reversed and Remanded.

MAY, J., and KEYSER, JANIS BRUSTARES, Associate Judge, concur.

Notes

a. Footnote 2 in the *HCA Health Services of Florida, Inc.* case points out a possible distinction between lost profits as general damages (part of the agreement between the two parties) and lost profits as consequential damages (losses stemming from failure to honor a contract with a third party due to the breach).

> While case law often refers to lost profits as consequential damages, lost profits do not always constitute consequential damages as a matter of law. For example, "[l]ost profits are recoverable as general damages where they flow directly and immediately from the breach of a contract." *Bird Lakes Dev. Corp. v. Meruelo*, 626 So.2d 234, 238 (Fla. 3d DCA 1993). Indeed, "when the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract, the damages sought are general damages*." Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109 (2d Cir.2007). Lost profits can constitute general damages where the non-breaching party seeks to recover the total value of the breaching party's promised payments less the cost of performance. *Id*. By contrast, consequential damages do not arise within the scope of the immediate transaction between the parties to a contract, "but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting." *Hardwick Props., Inc. v. Newbern*, 711 So.2d 35, 40 (Fla. 1st DCA 1998) (citation omitted). Here,

> although treatments at the CyberKnife facility were provided to third-party patients, the parties' agreement required the Hospital to pay per-click each time the equipment was used. Therefore, CyberKnife's lost profits, had they been proven, would have constituted general damages that flowed directly from the parties' immediate transaction.

204 So.3d at 472.

b. Worthy of reminder is the fact that there is a judicial preference for expectation damages over all other forms wherever possible. *See V5 Investments, LLC v. GoWaiter Business Holdings, LLC*, 210 F.Supp.3d 1329 (U.S. Dist. Ct. for the Middle District of Florida, 2016) and authority cited therein.

6. Lost Profits from Third-Party Contracts (Consequential or Special)

The following case introduces the concept reasons why a particular form of damage may not be awardable, which is primarily the subject of Chapter 10. The main focus for purposes of this Chapter is that lost business profits caused by a breach are one form of legal damage.

RIVER BRIDGE CORP. v. AMERICAN SOMAX VENTURES EX REL. AMERICAN HOME DEVELOPMENT CORP.

District Court of Appeals for the Fourth

District, 2009 18 So. 3d 648

MAY, J.

The developers appeal an adverse judgment following a jury verdict in a contractor's claim for lost profits. Multiple issues are raised. We write to address the damages issues. We affirm in part and reverse in part.

In December 1984, American Somax Ventures [ASV] and River Bridge Realty Corporation [RBC] entered into a Selected Builder's Agreement [SBA] for development of Phase I of a residential development, consisting of approximately five hundred dwellings on five building Pods. Paragraph

11.1 of the SBA provided for the developer to build certain amenities, including a bike path, lighting, electrical services, water and sewer lines, an entrance, gatehouse, wiring for cable television and security, and an amenities building with adjacent pool, tennis and multipurpose facilities, and graphics and signage. RBC agreed to complete the construction and installation of the amenities "as soon as reasonably possible, but in any event ... by no later than the date for such completion set forth in the Contract." The SBA also required ASV to enter into an Advertising and Promotional Expense Sharing Agreement in which RBC would provide marketing and sales services to ASV in exchange for a 1% commission on sales. The parties executed an Addendum to the SBA, which contained a right of first refusal. [Footnote omitted]

In 1987, RBC sent ASV a “land availability notice,” which would be the first of many, alerting ASV that it was willing to sell the next parcel, Pod 2F. The notice advised that the price and terms were subject to approval by RBC's board of directors, and asked for a refundable deposit. The notice instructed ASV to sign a waiver of its rights under the Addendum if it did not want to proceed. If the letter was not returned with the deposit within a set time period, RBC would consider it a waiver of ASV's right of first refusal.

In response, ASV described the notice of availability and request for waiver as a “thinly veiled attempt to anticipatorily breach” the SBA. ASV insisted that RBC was required to tender to ASV any third-party offer to purchase a parcel upon the same terms and conditions. The parties exchanged their respective positions, which remained substantially the same, when each new parcel came up for sale. The ultimate result was that RBC sold the subsequent parcels to third parties.

In 2000, ASV filed a two-count third amended complaint against RBC. The breach of contract claim alleged that RBC sold or contracted to sell parcels in derogation of ASV's right of first refusal, and that RBC had failed to construct the required amenities. Count II alleged that RBC breached the SBA and Listing Agreement by failing to act in good faith in using reasonably diligent efforts to advertise, market, and promote ASV's products within the River Bridge development.

At trial, an ASV principal testified that he was given a presentation on the lavish concept and amenities planned for River Bridge prior to entering into the SBA. However, when built, the clubhouse was substantially smaller than anticipated; there was only one unheated pool, two unlit tennis courts, and initially no barbecue pits.

In addition, the principal testified that RBC failed to establish the advertising and promotional program for the development in a timely and professional manner. One of the sales associates testified that the poor amenities led to poor sales. By 1989, tension had developed between the parties, and the exclusive listing agreement was terminated by agreement. RBC in fact instructed their sales staff not to show ASV's houses because RBC wanted to bring in a new builder.

ASV's expert, a consultant to real estate developers and builders, testified that the builders were not happy with the sales. [Footnote omitted] His firm was asked to provide advice to increase sales. He also testified that the amenities were woefully inadequate. In his opinion, the 43 homes planned for Parcel 1A should have been sold within 18 months. He found the sales staff “untrained, untalented, unsupervised,” and unable to sell the new homes.

ASV's expert testified that ASV built and sold 14 homes in their best year even though he opined that it should have sold 30 homes. He then estimated an $11,000 per-unit profit calculation, which he used to determine what ASV would have earned had there been a “proper absorption” rate in Parcel 1A. He arrived at a 7.32% profit rate. RBC objected to the qualifications of the expert and argued that the testimony was too speculative. The trial court overruled the objections.

In calculating lost profits on the subsequent pods, ASV's expert used the actual sales made by the builders of the subsequent pods to determine the lost profits. He took the number of actual closings and calculated the estimated profit at the 7.32% rate derived from the estimation for Parcel 1A. However on cross-examination, he testified that he did not know whether the other builders ever recognized a profit in the homes sold and did not know the extent of their costs.

The jury ultimately returned a verdict in favor of ASV for $8,573,804. The jury specifically awarded $1,248,817 as damages for the RBC's failure to build the amenities and properly market the property and the remaining sum for lost profits for each of the parcels subsequently built and sold by other builders in breach of the Right of First Refusal.

RBC argues on appeal that the judgment must be reversed because the expert was not qualified, an incorrect measure of damages was used, and the damages were too speculative. We find that the testimony concerning the lost profits derived from the sale of the remaining parcels was too speculative. We therefore affirm in part and reverse in part.

“When a party seeks lost future profits based upon a breach of contract or other wrong, the party must prove that the lost profits were a direct result of the defendant's actions and that the amount of the lost profits can be established with reasonable certainty.” *Forest's Mens Shop v. Schmidt*, 536 So.2d 334, 336 (Fla. 4th DCA 1988). “Lost profits are generally proven by one of two methods: (1) the ‘before and after theory’ or (2) the ‘yardstick test.’ ” *4 Corners Ins., Inc. v. Sun Publ'ns. of Fla., Inc.*, 5 So.3d 780, 783 (Fla. 2d DCA 2009) (*citing G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1538 (11th Cir.1985)). “The yardstick test is generally used when a business has not been established long enough to compile an earnings record that would sufficiently demonstrate lost profits” and “compares the profits of businesses ‘that are closely comparable to the plaintiff's.’ ” *Id*. However, “[l]ost profits must be established with a reasonable degree of certainty and must be a natural consequence of the wrong,” and “[s]uch an award cannot be based upon speculation or conjecture.” *Sostchin v. Doll Enters., Inc.*, 847 So.2d 1123, 1128 (Fla. 3d DCA 2003).

ASV suggests an adequate yardstick was provided by the contractors that built out the subsequent parcels. While those contractors might have provided the trappings of a yardstick, it was not enough to simply assume those contractors were comparable and made a profit; it was necessary to prove both. To do so, it was essential that the actual profit realized be proven or that the profit be determined by subtracting their expenses from their gross sales. It was also essential to establish that those contractors were “closely comparable” to ASV. The expert in this case did neither.

ASV adduced evidence that convinced the jury that its slow sales on the initial pod were attributable to RBC's breach of its obligations to provide amenities and marketing. It also introduced testimony explaining that its business model, which was typical for large developments, included a large expenditure on the first Pod, with reduced costs for subsequent pods. ASV accounted for estimated costs by applying the estimated 7.32% average per-home profit margin, which its expert testified was below the market average. He then applied that 7.32% profit margin to the gross sales price on the additional pods built by other contractors.

RBC argues that the testimony was speculative because it was based on “the number of houses built by the other homebuilders” without “even knowing whether they made a dime of profit.” While ASV's expert explained

how he arrived at his 7.32% profit rate as it applied to Pod 1A, we find the proof lacking as it relates to the pods built by the other contractors. ASV could not establish that the subsequent builders were in the same “start-up” position as ASV, could not prove the subsequent builders' costs, could not prove that those builders actually made a profit on the subsequent pods, and could not prove that if ASV had been given the opportunity to build out the subsequent parcels, it would have been able to finance the build out and reach the same result as the other builders. This is critical, as times and economies had changed. For these reasons, we find the testimony lacks the reasonable certainty necessary to support the yardstick approach to lost profits, rendering the testimony too speculative to sustain the damages claimed for the future pods.

We therefore affirm in part and reverse in part. We remand the case to the trial court to vacate that part of the judgment that relates to lost profits for the subsequent pods.

Reversed in part and Affirmed in part.

TAYLOR, J. and GARCIA-WOOD, MARINA, Associate Judge, concur.

7. Lost Value Contracts for Services as Promised Versus as Received or Delivered (General)

Readers may note that this was the type of damages recovery utilized in the *Grossman Holdings, Ltd.* case earlier in this Chapter. A few others may help to develop a sense of the diverse nature of damages that would qualify under this category.

HAZEN v. COBB

Supreme Court of

Florida, 1928 96 Fla.

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* * *

Recovery may be had on common counts on express contract partially performed or otherwise put to an end for actual value of services rendered or materials furnished. Where an express or special contract has been partly performed by plaintiff, but has been put an end to by mutual consent of the parties, or act of the defendant, or act of God, or the contract for technical deficiencies in its execution is not legall *(sic)* enforceable, and the part performance thereof was beneficial to the defendant and accepted by him, or full performance waived, the plaintiff may recover on the common counts the actual value of the services rendered or materials furnished; and in such cases the evidence of the express contract may usually be admitted as tending to show the actual value of such services rendered or materials furnished.

* * *

AHIMSA TECHNIC, INC. v. LIGHTHOUSE SHORES TOWNHOME DEVELOPMENT CO.

District Court of Appeal for the Fifth District of

Florida, 1989 543 So. 2d 422

DAUKSCH, Judge.

Appellant performed engineering services for appellee under an oral contract to design a storm water management system for appellee's townhouse development. Upon completion of the contract, appellee refused to pay appellant's final bill claiming appellant breached the oral contract by failing to professionally perform its duties in designing the storm water management system. Appellant sued for foreclosure of a mechanic's lien and breach of contract.

We agree with the trial court that the mechanic's lien was untimely filed and affirm the final judgment as to this count. We reverse the judgment as to the breach of contract count because there is no evidence that appellant breached the contract. The expert testimony was clear and unequivocal that appellant presented appellee with valid engineering alternatives, which were accepted by the city engineers, and performed all services within the standard of care required of professional engineers in the community. In addition, the oral contract did not have an express provision requiring appellant to disclose its sources for the engineering calculations used in the design.

Upon remand, the trial court should enter a judgment in favor of appellant for breach of contract and hold a hearing on damages. Consequently, appellee will no longer be the prevailing party entitled to attorney's fees under section 713.29, Florida Statutes (1987) because appellant will obtain a money judgment for services under the contract even though it failed to establish a mechanic's lien. *See Plaza Builders, Inc. v. Regis*, 502 So.2d 918, 920 (Fla. 2d DCA 1986); *Schabert v. Montaltos*, 445 So.2d 1136, 1137 (Fla. 2d DCA 1984). The award of attorney's fees is also reversed.

REVERSED and REMANDED.

SHARP, C.J., and COWART, J.,

concur.

8. Lost Value Contracts for Goods as Promised Versus as Received or Delivered (General)

That the loss in value in the *Collins* case immediately below is mandated by a special Florida statute does not constraint the rule’s use in other cases not covered by this special consumer (or here, trade persons) protection law. Similar concepts will be addressed in Chapter XI on damages in the special case of sale of goods.

District Court of Appeal for the Fifth District of

Florida, 2004 894 So. 2d 988

ORFINGER, J.

Carolyn Collins appeals the trial court's dismissal with prejudice of her second amended complaint, which asserted a claim under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) [Footnote omitted] against DaimlerChrysler Corporation (Chrysler). Because we conclude Collins's amended complaint adequately stated a FDUTPA claim, we reverse for further proceedings.

In her second amended complaint, Collins alleged that she owned a Chrysler automobile equipped with GEN-3 seatbelt buckles, which, allegedly due to a design defect, are unreasonably dangerous and unfit for ordinary use as a passenger restraint system. Collins further alleged that she based her decision to purchase a Chrysler, in part, on Chrysler's advertising of its vehicles as safe and in compliance with all relevant safety standards. Collins claimed that Chrysler knew or should have known that the GEN-3 seatbelts were defective, but took no action to remedy the problem. [Footnote omitted] Collins sought damages from Chrysler for the diminished value of her vehicle, measured as the difference in the market value of the automobile in the condition in which it was delivered, and its market value in the condition in which it should have been delivered. She also sought recovery for lost vehicle use during the time required to repair or replace the seatbelts.

On Chrysler's motion, the trial court dismissed Collins's second amended complaint with prejudice, finding that her complaint failed to demonstrate that she had suffered a loss compensable under FDUTPA. On appeal, Chrysler maintains that dismissal was proper because Collins did not incur any out of pocket damages on account of the alleged defects in the GEN-3 seatbelt buckles, and, as such, the complaint failed to state a cause of action. We disagree.

FDUTPA provides that an aggrieved party may initiate a civil action against a party who has engaged in "[u]nfair methods of competition, unconscionable acts or practices," and "unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1), Fla. Stat. (2003). A primary purpose of FDUTPA is "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." § 501.202(2), Fla. Stat. (2003); *see Marshall v. W & L Enters. Corp.*, 360 So.2d 1147, 1148 (Fla. 1st DCA 1978) (the statute's purpose is to "make consumers whole for losses caused by fraudulent consumer practices"), *rev'd on other grounds, Hubbel v. Aetna Cas. & Surety Co.*, 758 So.2d 94 (Fla.2000). To give the statute life, the Legislature conferred the right to bring an individual action on any "consumer who has suffered a loss as a result of a violation" of FDUTPA to "recover actual damages, plus attorney's fees and court costs." § 501.211(2), Fla. Stat. (2003).

Here, Collins sought to recover the diminution in value of her Chrysler automobile caused by the allegedly defective seatbelt buckles. FDUTPA authorizes a person "who has suffered a loss" as a consequence of a violation of the statute to recover "actual damages." § 501.211(2), Fla. Stat. (2003). Chrysler argues that diminution in value of a product does not constitute "actual damages" as FDUTPA requires to support a statutory claim. Rather, Chrysler contends that Collins must allege that the seatbelt has malfunctioned or manifested the alleged defect in some way to state a cause of action under FDUTPA. Florida case law shows differently.

In the context of FDUTPA, "actual damages" have long been defined as " 'the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.' " *Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. 3d DCA 1984) (*quoting Raye v. Fred Oakley Motors Inc.*, 646 S.W.2d 288, 290 (Tex.Ct.App.1983)); *see Smith 5.2001 S. Dixie Highway, Inc.*, 872 So.2d 992, 994 (Fla. 4th DCA 2004*); H & J Paving of Fla., Inc. v. Nextel, Inc.*, 849 So.2d 1099 (Fla. 3d DCA 2003) (recognizing that measure of actual damages is the difference in the

market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the parties' contract).

In *Davis v. Powertel*, 776 So.2d 971 (Fla. 1st DCA 2000), the First District Court of Appeal determined that FDUTPA allows for damages based on diminution of value. There, the class plaintiff alleged that Powertel sold cellular telephones without informing the purchasers that the phones were programmed to work only with Powertel's communication services. The class plaintiff alleged that although these phones appeared to be the same as other Nokia and Motorola models, they contained a chip that rendered them inoperable when used with any other wireless phone service. The circuit court dismissed the class plaintiff's FDUTPA claim. However, on appeal, the appellate court agreed that the class plaintiff adequately stated a claim for damages under FDUTPA, recognizing "[t]he [claim], according to the plaintiffs, was that Powertel's alleged nondisclosure had reduced the value of the phone in each case." *Id.* at 973. Accordingly, the court allowed the case to proceed because the "alleged deceptive practice reduced the value of the telephones." Id. at 974-75 (emphasis added); *see also Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So.2d 311, 313 (Fla. 4th DCA 1998).

Admittedly, there are jurisdictions with similar consumer protection laws that support Chrysler's argument that actual out of pocket losses are a necessary prerequisite to a deceptive trade practices action. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir.2002). However, Florida decisional law has followed a different track. If the courts have misperceived legislative intent, the Legislature can surely rectify the problem. However, we observe that Florida courts have allowed diminished value to serve as "actual damages" recoverable in a FDUTPA claim since at least Rollins in 1984 without any corrective action by the Legislature.

We see no requirement in FDUTPA that a defect manifest itself by failing to operate in an emergency or by causing injury. Under the facts asserted in this case, Collins has alleged more than a possible injury. She claims an actual injury in the form of insufficient product value. In other words, she contends that she did not get what she bargained for. Whether her allegations have merit remains to be decided. [Footnote omitted]

This case turns on a relatively simple question, at least as to damages-Is a car with defective seatbelt buckles worth less than a car with operational seatbelt buckles? Common sense indicates that it is, but, at this stage of the case, we need not decide that issue. Rather, we only determine that Collins is entitled to go forward with her case.

For the foregoing reasons, we reverse and remand for further

proceedings consistent herewith. REVERSED and REMANDED.

TORPY and PALMER, JJ., concur.

Note

The Florida legislature has enacted a variety of consumer protection laws. Many are located in Title XXXIII, Chapter 501, FLA. STAT. § 501.001 (2017) *et seq.* As one may imagine, these cover

industries and transactions that are known to involve a high risk for fraudulent activity. Credit cards, health club memberships, home-solicitation sales and commercial weight-loss practices are just a few examples. One of the most well-known is the automobile "lemon law," which applies to new autos that fail to properly operate after purchase within the first twenty-four months of purchase. Florida's version is found at FLA. STAT. § 681.10 (2017) *et seq*. The lemon law uses the term "substantially impair," which would appear to be a direct borrowing from U.C.C. Article 2 (and the state statutes adopting it). There is even a defense to enforcement of a newspaper subscription contracts sales contract where the contract is not in writing. FLA. STAT. § 725.03 (2017) (this is a *Statute of Frauds* law, addressed in Chapter XIII). Some are very specific like the lemon law, and others contain relatively broad, and therefore actionable, behaviors that are fraudulent such as the FDUPTA mentioned in the *Collins* case.

CMM Approach: Because consumer protection laws set out standards for violation, authorization of damages, etc., lawyers should always be on the lookout for their application. Such statutes may simplify the mechanics of establishing a claim. If so, be aware that there may be special filing requirements to preserve such rights. They may also provide for certain benefits such as payment by the violator of the successful claimant's attorneys fees. *See, e.g.*. FLA. STAT. § 501.005(16)(a) (2017) (allowing costs of bringing a lawsuit, reasonable attorneys fees and from

$100 to $1000 for failures by credit reporting companies to adhere to the requirements set out in the statute). This makes clear one reason for certain Blue Sky laws – the damages may be generally low and not enough to pay for litigation costs – unless those costs are awardable in successful legal proceedings.

Problem 9-4

Fisherman hired LuresInc to build a special rod and reel for trout fishing worth $2,000, for which Fisherman paid an up-front $500 deposit. LuresInc got busy but failed to build the rod and reel by the due date, informing Fisherman that LuresInc was experiencing a backlog of orders that made completion of Fisherman's rod and reel unlikely for almost another year. To compete in a special competition, Fisherman bought a replacement rod and reel from one of LuresInc's competitors for

$3,500. What is the likely best form(s) of damages that Fisherman should claim? Is there more than one possibility in this case? (Awardable damages categories are usually, but not always, mutually exclusive – you can get one or the other, but usually not both).

Problem 9-5

LuresInc agreed to make a special rod and reel for Fisherman for $2,500. After deducting the cost of materials and labor, the profit on the sale would have been $1,000 had Fisherman not breached by notifying that he would not go through with the deal. What is the likely best form of damages that LuresInc should claim? What if, to secure the contract with Fisherman, LuresInc reduced the price by $100 in good-faith to induce Fisherman to sign the contract? Would the calculation for damages change?

Note

While claimants and their attorneys advocate for a right to specific types of damages compensation, it is the courts that choose which one(s) is/are the most appropriate under the circumstances. Certain policy concerns may influence a court's choice of the proper form of remedy. For example the award of price differential for services between the services as promised versus as delivered or performed, rather than for example specific performance. It may be best to award a homeowner the difference in real estate value with improvements as promised from the value with improvements as delivered. The policy in this kind of case would be to avoid unnecessary waste of resources. A ground-breaking case in this area is *Jacob & Young, Incl. v. Kent*, 123 N.E. 889 (1921) (the majority opinion, written by the famed Justice Cardozo, called for the value differential of the real estate rather than an order to rip out and replace the wrong pipe used in construction of an expensive home). The Restatement (Second) Contracts § 360 is instructive, but we take the opportunity to introduce a Florida-specific source:

§ 22. Factors Affecting the Adequacy of Damages

In determining whether the remedy of damages would be adequate, courts view as significant factors the difficulty of proving damages with reasonable certainty, the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and the likelihood that an award of damages could not be collected.[1] However, according to the Restatement Second of Contracts, such factors are neither exhaustive nor exclusive of other factors. A court may also consider, for example, the probability that full compensation cannot be had without multiple litigation although this is an unusual circumstance in contract cases.[2]

Furthermore, under the Restatement Second of Contracts, it has been said that damages may be inadequate to protect the injured party's expectation interest because the loss caused by the breach is too difficult to estimate with reasonable certainty. If the injured party has suffered loss but cannot sustain the burden of proving it, only nominal damages will be awarded. If the party can prove some but not all of the loss, the injured

party will not be compensated in full. In either case, damages are an inadequate remedy. Some types of interests are by their very nature incapable of being valued in money. Typical examples include heirlooms, family treasures, and works of art that induce a strong sentimental attachment. Examples may also be found in contracts of a more commercial character. The breach of a contract to transfer shares of stock may cause a loss in control over the corporation. The breach of a contract to furnish an indemnity may cause the sacrifice of property and financial ruin. The breach of a covenant not to compete may cause the loss of customers of an unascertainable number or importance. The breach of a requirements contract may cut off a vital supply of raw materials. In such situations, equitable relief is often appropriate.[3]

The Restatement also states that if the injured party can readily procure by the use

of money a suitable substitute for the promised performance, the damage remedy is ordinarily adequate. Entering into a substitute transaction is generally a more efficient way to prevent injury than is a suit for specific performance or an

injunction, and there is a sound economic basis for limiting the injured party to damages in such a case. Furthermore, the substitute transaction affords a basis for proving damages with reasonable certainty. The fact that the burden of financing the transaction is cast on the injured party can usually be sufficiently compensated for by allowing interest. There are many situations, however, in which no suitable substitute is obtainable, and others in which its procurement would be unreasonably difficult or inconvenient or would impose serious financial burdens or risks on the injured party. A suitable substitute is never available for a performance that consists of forbearance, such as that under a contract not to compete. If goods are unique in kind, quality, or personal association, the purchase of an equivalent elsewhere may be impracticable, and the buyer's inability to cover is strong evidence of the propriety of granting specific performance. Shares of stock in a corporation may not be obtainable elsewhere. Patents and copyrights are unique. In all these situations, damages may be regarded as inadequate.[4] Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution. The party in breach may be judgment proof or may conceal assets. Statutes may exempt some or all of his or her property from execution. If the party in breach is insolvent, specific performance may result in a preferential transfer to the party seeking relief and will then be denied on grounds of public policy. If, however, the contract is unperformed on both sides and provides for a fair exchange, performance will not result in a preferential transfer and may benefit other creditors and help prevent insolvency.[5]

Footnotes

[1] Am. Jur. 2d, Specific Performance § 12.

[2] Restatement Second, Contracts § 360, comment a. [3] Restatement Second, Contracts § 360, comment b. [4] Restatement Second, Contracts § 360, comment c. [5] Restatement Second, Contracts § 360, comment d.

48 Fla. Jur 2d Specific Performance § 22 (Westlaw. © 2017 Thomson Reuters).

Note

There may be occasions where it is appropriate for a court to award a minimal amount, for example

$1. Perhaps the successful party was also a bad actor whose actions would not merit a large recovery. Nominal damages awards may also be appropriate where evaluation of damages is impossible. Two examples come to mind. First, there may be an early breach of minor impact, but an early award even of nominal damages alerts the parties to the likely ruling for future breaches amongst the same parties and possibly even the same transaction or set of transactions. An early nominal award sets the stage for further performances between the parties by defining who was, and therefore will continue to be, the breaching party. Second, a contractual party may have its own insurance, and needs a court ruling establishing another party's breach before insurance proceeds can be paid.

(24) Outline

Outline: Legal (Money) Damages

(Listed in order of worst to best, depending on which are justified by facts:)

1. Restitution
2. Reliance (pre-breach* / post-breach*) — *This distinction may be important to a comparison with U.C.C. Article 2 damages
3. Expectation (aka Compensatory): General damages (naturally flow from breach) / Special damages (not necessarily known or anticipated)**

** U.C.C. Article 2 denotes Special damages as "consequential" damages.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM Chapter 9

1. Different forms of "legal" damages
2. Election of remedies
3. Similarities and differences in legal damages between common law contracts (e.g. services) and sale-of-goods contracts (covered further in Chapter XI)
4. Ability of breaching party to collect damages under certain circumstances
5. The test which must be met to qualify for equitable, rather than legal, damages

SUGGESTED EXERCISE(S)

1. Have students create a chart of common law damages, leaving room to add some exceptions covered in Chapter X and the damages from U.C.C. Article 2 (FLA. STAT. §

672.101 (2017) *et seq.*) sources after covering them in Chapter 11. The chart should include (not in order here) expectation damages, reliance damages, general damages, restitution damages, special damages. Also have students make room in their charts for including, at a later time, equitable damages.

2. Identify one other legal source that collects and reports on Florida-specific damages cases in addition to the Restatements (First or Second), or the U.C.C. Article 2, or the Florida Jurisprudence (Second) series.

Chapter 10: DAMAGE REQUIREMENTS AND LIMITATIONS

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Some damages that a breach would cause are clear as to their creation, as to their value, and as to their validity as the subject of recompense for injury based on contractual relations. When these aspects coalesce, such damages are readily awardable. Other damages are not necessarily likely, or are difficult if not impossible to measure, or for some reason are simply not awardable. This Chapter explores the viability of damages to remedy a contractual breach. What a non-breaching party wishes for damages is not

necessarily what courts can or should award. The Chapter commences with several of the main requirements that damages must have in order to merit a court-ordered remedy. Next, contractual parties' attempts to limit or to exclude damages is considered.

Typically, expectation damages, as set out in Chapter IX, are favored by the party seeking redress. There are situations, however, when items in this basket of remedies may not be awardable. The three primary requirements for expectation damages are that they be *certain*, *foreseeable* and *not readily avoidable* (the latter idea is often expressed as a non-breaching party's duty to mitigate damages acting reasonably). Additionally, as addressed briefly at the end of Chapter IX, courts and public policy do not favor *windfall gains* (i.e., award amounts that put a party in a better position than would be the case had the contract been fully and properly performed). Further, courts and public policy do not favor *punitive* damages, which should only be awarded in cases that entail some other basis, e.g., in tort, in addition to a contractual breach.

1. Certain

A. Uncertainty

The following excerpt clarifies the difference between *uncertainty of damage*, on the one hand which would likely preclude recovery (at least "legal" recovery – equitable damages are possible as well, and are addressed in Chapter XII), and uncertainty on the *amount of damage*, on the other.

CENTEX-ROONEY CONSTR., CO. v. MARTIN COUNTY

District Court of Appeal of Florida, Fourth District, 1997

706 So. 2d 20

* * *

Despite Centex's primary contention that the County failed to present sufficient evidence to prove its damages, this court has ruled that:

> [u]ncertainty as to the amount of damages or difficulty in proving the exact amount will not prevent recovery where it is clear that substantial damages were suffered and there is a reasonable basis in the evidence for the amount awarded. Ultimately the degree of certainty simply requires that the mind of a prudent impartial person be satisfied with the damages.

Adams v. Dreyfus Interstate Dev. Corp., 352 So.2d 76, 78 (Fla. 4th DCA 1977) (emphasis added)(footnote omitted); *see also Servpro Indus., Inc. v. Spohn*, 638 So.2d 1001, 1003 (Fla. 4th DCA 1994)("a confusing state of financial records does not prevent recovery if there is sufficient evidence from which a damage calculation can be made"). Gauthier's testimony was the only uncontroverted evidence in the record of the County's damages resulting from Centex's breach. The County's unrefuted evidence of its actual costs to remediate, redesign, and reconstruct the buildings, as well as relocate and finance, reduced by the costs for upgrades and improvements, established a sufficient basis to determine damages as of the date of the breach. As there was a reasonable basis in the evidence to support the jury's verdict of $11,550,000, an amount nearly $5,000,000 less than the County's claimed damages, we affirm the trial court's decision to deny Centex's motion for directed verdict on the damage issue.

* * *

Note

There are cases where damage in some form is obvious, but the amount is not calculable for some reason or the claimant fails to establish proof of the damage amount. In such cases, a court may award nominal damages, which indicate a breach but at the same time, an inability for some reason to ascertain the value of damage. Rather than no award, a court can rule in favor of a nominal one. For a case covering these issues in the context of a warranty claim under the Magnussson-Moss Warranty Act, a federal consumer protection law, *see Kia Motors America, Inc. v. Doughty*, [ ] So.3d [ ] (Fla. 2d DCA 2018) (43 Fla. 50. Weekly D595b). The case result hinges on a claimant's burden of proof at trial.

CMM Approach: The distinction between the uncertainty of *damages* (consider Chapter VIII material) on the one hand, and the uncertainty of *calculation* (this Chapter) of what are undeniable damages, is important. Taking stock of these kinds of distinctions is highly recommended. In the short run, it is the kind of distinction that causes many to pick a wrong multiple-choice answer on the Multistate Bar Exam. Knowing this distinction indicates a more refined knowledge of the entire issue. Knowledge of

distinctions and complexities indicates a more developed understanding of the law.

B. Intangibles as “Uncertain”

HOBBLEY v. SEARS, ROEBUCK & CO.

District Court of Appeal of Florida, First District, 1984

450 So. 2d 332

* * *

The evidence presented included the following. On December 3, 1980, the Hobbleys, long-time customers of Sears, had a Sears serviceman perform a routine service inspection of their furnace. The serviceman recommended that the furnace be replaced as it was unsafe for use. The Hobbleys then purchased a new furnace from a Sears salesman, who checked their premises before advising them concerning the model to purchase. The purchase price included the cost of installation, and the Sears salesman arranged for installation by a Sears installer. In the opinion of the Sears salesman, who had thirty years of experience in the sales and installation of units similar to the one he sold the Hobbleys, it was possible by removing the exterior cover of the furnace, to place the new furnace in the area occupied by the old one. The installer disagreed, maintaining that the new furnace could not be placed in the Hobbleys' attic without making structural changes in the roof trusses. As it turned out, the installer refused to perform the work at the price quoted by Sears, yet Sears failed to explain this to the Hobbleys.

The availability of the Hobbleys in order to have the installation performed is in dispute. According to Sears, the Hobbleys were difficult to reach. On the other hand, the Hobbleys testified that they were both employed by the county school system and were available at home after 3:00 p.m., and that they had tried repeatedly, without success, to reach an agreement with Sears' service personnel. Although Sears never installed the furnace, the Hobbleys were billed by Sears and they paid in full for the furnace, for insulation, and for installation.

During the winter of 1980–1981 (December, January and February), the Hobbleys relied on three space heaters for warmth. In addition to the fact that the space heaters were inadequate for the purpose, due to the wiring in the Hobbleys house they could not all be used at the same time. The Hobbleys testified to their embarrassment when guests in their home implied they had

not paid their electric bills. Mr. Hobbley testified too that the cold house aggravated his arthritic condition.

Finally, around March 1, 1982, the Hobbleys bought a furnace from another company and had it installed. In May 1981 the Hobbleys sued Sears for the purchase price of the furnace, plus interest, and in Count II—they sued for expense incurred for space heaters and for their physical discomfort and embarrassment. The Hobbleys prevailed on the Count seeking return of the purchase price, but the trial court struck the Count II claim for damages for physical discomfort and embarrassment.

Damages are awarded in a breach of contract action as an attempt to place the injured party in the position he or she would have occupied had the contract been performed. *Hodges v. Fries*, 34 Fla. 63, 15 So. 682, 684 (1894). To be recoverable, such damages must arise naturally from the breach, or have been in contemplation of both parties at the time they made the contract, as the probable result of a breach. *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng.Rep. 145 (1854). *See also: Brock v. Gale,* 14 Fla. 523 (1874).

We agree with the trial court that a jury may not consider “intangible” (footnote omitted) damages such as embarrassment as an element of compensation damages in a contract action. Nevertheless, we do find that the Hobbleys' claim for physical discomfort, although inartfully framed, clearly has merit. (While this claim should have been framed as a claim for “loss of use,”(footnote omitted) under notice pleading the claim was adequately presented.) We find that it was readily foreseeable that the Hobbleys would need heat in the winter. They acted to replace their old furnace on the advice of Sears' service personnel, and they negotiated the purchase of a new furnace on the advice of Sears' sales personnel. We find that the physical discomfort suffered by the Hobbleys because of Sears' failure to install their new furnace was clearly in the contemplation of the parties at the time they entered into the agreement. The value of a warm home during the winter months, is not so uncertain or speculative as to be impossible to fix in a monetary award. Therefore, we reverse that portion of the Count II dismissal which claimed damages for physical discomfort and remand to the trial court for proceedings consistent with this opinion.

BOOTH and SHIVERS, JJ., concur.

Problem 10-1

Becky’s Burgers, an American fast-food franchise that has been thriving for over 60 years, has recently contracted with Carter’s Construction to build a new franchise location of its business, which would bring the franchise to a total of 20 locations. Each franchise has made between $1.1 to $1.2 million dollars in revenue in the first year alone, with little deviation, and regardless of location. The profits and operating costs, as well as projections, of the currently existing Becky’s Burgers locations have been cataloged and used as statistical projections when Becky was considering opening a new franchise location. A few days before Carter’s Construction was supposed to begin fulfilling its contractual agreement, Carter’s notified Becky that it was unable to build the new franchise location due to complications with its current project. If Becky sues Carter’s Construction, will she be able to recover for lost profits from the franchise? If so, for how long? Would your answer change if the planned construction was the very first start-up of Becky’s Burgers locations?

2. Foreseeable

The following case excerpt addresses two primary notions: (1) what damages may be foreseeable and therefore awardable; and (2) the nature of how foreseeability may be established (direct written estimate, implied from nature and profession of traveler, etc.). Worthy of note is that the last case excerpt, *Hobbley*, also raised the issue of foreseeability.

BROCK v. GALE

Supreme Court of Florida, 1874

14 Fla. 523

* * *

The question here presented is, whether the plaintiff could, in this action against a common carrier for the loss of his baggage, he being a traveller upon the defendant's steamboat, recover damages for the loss of the profits which he might have made in the practice of his trade or profession, if his baggage, including the implements of his trade, had not been lost. The third exception arises upon the questions put by plaintiff's counsel on the trial to the plaintiff as a witness in his own behalf, as to whether he was detained at Jacksonville in consequence of the loss, and what were his monthly receipts from his business at home, and whether he was prevented by the loss of his instruments from pursuing his profession and for what length of time. The court permitted the questions to be answered, notwithstanding defendant's

objections. Witness answered that his receipts for several years had averaged three hundred dollars per month, or at least three thousand dollars per year; that he was prevented by the loss of his instruments from pursuing his business to some extent for one month, and had never since been as well able to pursue his business for want of those statements.

The law in such cases is laid down by Sedgwick in his book on the measure of damages as follows: “On reviewing the whole subject, it seems to me that the language of the Louisiana Code expresses the true rule; and that it is no more than justice that a defendant in default should be compelled to make good the damages sustained by his breach of contract which were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.”

Under ordinary circumstances the damages flowing from a breach of contract to carry and deliver goods would be the value of the goods at the time of the loss and interest on the amount. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier. “For (says the court in *Hadley vs. Baxendale*, 9 Exch., 341,) had the special circumstances been known, the parties might have expressly provided for the breach of the contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. These principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.” And in *Griffin vs. Colver*, 16 N. Y., 489, Judge Selden states it thus: “The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract--that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.”

In the present case there is no room for pretense that the defendant contemplated that the plaintiff would sustain any damage beyond that which would follow the loss of any kind of baggage; 1. e., the value of the goods and the expense of a brief detention in endeavoring to find them, with interest. The defendant cannot be chargeable for the loss of dentist's tools beyond what he would be liable to pay any other passenger for the loss of any goods of like value, unless he has especially agreed to be responsible for other loss or damage. Doctor Gale did not inform the defendant that he was a dentist; that his tools were set with diamonds and rubies, or that in case they should be lost he would be unable to pursue his avocation for six months or for one month; and hence the defendant did not contemplate any such risk in carrying him as a passenger upon his steamboat, with his valuable baggage.

* * *

It is unnecessary to elaborate upon these propositions. In examining the record we find that the Judge's charge is in the main correct, except in its too general language as to the allowance of damages, already alluded to. It is not entirely proper, however, for the Judge to specify what particular articles of property, designating them by name, may be included in the term “baggage,” as this comes very nearly to an argument and opinion upon the proofs in the case. For instance, in giving the fourth instruction asked for by plaintiff to the jury, this language was used: “Thus a carpenter's tools have been held suitable baggage for a carpenter, a surgeon's instruments for a surgeon.” While it is true that courts have refused to set aside a finding of a jury to that effect, on the ground that “it is for the jury to decide whether the articles contained in the plaintiff's valise, for which payment is claimed, are such property as may be deemed baggage,” (as the jury were instructed on the request of the defendant,) it is not proper for the court to suggest, by way of example, that which may influence the jury upon the question of fact they are to try.

The sixth error assigned is that the court refused to charge the jury, as requested by the defendant's counsel. The instructions asked by the defendant's counsel were given by the court, except the 4th, 5th, 6th and 7th, and of these, all except the 7th had already been given in substance. It is not error to refuse to repeat a charge already given.

The seventh instruction asked by defendant's counsel is in these words: “If it appears that the valise in question contained jewelry or precious stones, or instruments set with gems, precious stones, or gold, or other precious metals, or gold or silver plated or mounted instruments, and that no written notice of the character and value of the same was given to the master, clerk, agent or owner of defendant's said steamboat, then defendant is not liable for the same as a carrier.” This was refused by the court. It is insisted by the defendant that this instruction should have been given according to the provisions of the 69th section of “An act for the better security of life, &c.,” passed by the U. S. Congress, and approved Feb. 28, 1871, which provides, “if any shipper or shippers of platina, gold, gold dust, silver, bullion or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones,” and other like articles enumerated, “contained in any parcel or package or trunk, shall lade the same as freight or baggage on any boat or vessel, without at the time of such lading giving to the master, clerk, agent or owner of such boat or vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner or owners of said boat or vessel shall not be liable as carriers thereof.”

It seems clear, however, that this section refers to property of the descriptions mentioned, sent by shippers of such goods in the common mercantile acceptation of the words shipper or shippers, who forward goods as freight or baggage under bills of lading, and that the act had in view the protection of the revenue of the United States, as well as the protection of vessels against fraud and against the penalties for violations of revenue laws. The language used does not well apply to a passenger who carries in his trunk his ordinary wearing apparel, ornaments and professional implements, however rare or valuable. He is not a shipper, and does not “lade” a vessel as a shipper, nor give or receive a bill of lading for his personal baggage, nor pay freight thereon, as does a shipper. We do not think the court erred in refusing to give the instruction.

The court charged the jury that “all articles, which it is usual for persons traveling to carry with them, whether from necessity, convenience or amusement, fall within the term baggage.” And, “that if it appears by the evidence, that the contents of the valise, or any portion of the same, were of a great or extraordinary value, for a person of plaintiff's business and station in life, without notice of the same being given to defendant, he cannot be held liable for their loss.” And the court further charged that it is for the jury to decide what articles in the valise came within the definition of baggage, and this last was given at the request of the defendant's counsel. The Supreme Court of Pennsylvania in *McGill vs. Rowland*, 3 Barr, 451, say that “it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the purposes of traveling, because in the nature of things it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely on the intelligence and integrity of the jury to apply the proper corrective.” (See Angell on the law of Carriers, sec. 115, et seq.)

This, after all, is the correct rule for the determination of this case. The jury must determine, as a question of fact, whether the articles contained in the plaintiff's valise were the necessary and convenient articles of baggage of the plaintiff as a traveller, according to his occupation and position in life, and was their value a reasonable value of such articles to be carried as baggage, for the loss of which a common carrier should be held liable under the circumstances of the case. Any apparent abuse by the jury, whereby gross injustice should be done, would of course be corrected by the court.

For the errors in the proceedings and trial herein mentioned, the judgment must be reversed, and a new trial granted. The defendant is entitled to judgment upon his demurrer to the second count in the declaration.

Judgment reversed, and a new trial granted.

Note

The third-last paragraph in the *Brock* excerpt harkens back to the question of law/question of fact dichotomy presented in Chapter 1. Which one is question of law, and which is a question of fact?

Problem 10-2

Chucky Chuckler, a popular comedian on a nation-wide comedy tour, entered into a contract with the Giggle Shack, a local comedy studio, to perform a one-night stand-up act. The Giggle Shack, which was seeking to double its ticket sales by taking advantage of the popular comedian, entered into an agreement with Promotions Plus in which it would pay Promotions Plus $2,000 to promote the show. The Giggle Shack also spent $1,000 on local billboards and $1,500 on local advertising for the show. The morning that Chucky Chuckler was scheduled to perform, Chucky called the Giggle Shack and informed it that he had come down with the flu and could not perform. The Giggle Shack could not find a replacement comedian and had to cancel the show. If the Giggle Shack sues Chucky Chuckler for the $4,500 in advertising, would it be successful? What if Chucky had cancelled the show a week in advance? Would your answer change if Chucky used to work for Promotions Plus and was well aware of how it did business with the Giggle Shack?

3. Avoidable

The excerpt that follows somewhat begrudgingly acknowledges that if proof of the reasonable opportunity to avoid consequences of a breach exists, it may disqualify a non-breaching claimant from otherwise awardable damages (such as lost earnings as a licensed medical professional). The following excerpt also makes clear an important distinction that at least some of the Florida courts expect Florida lawyers, and possibly bar exam takers, to know. (*See* CMM Approach in subsection A of this Chapter, and take a cue from the title to this subsection).

A. Mechanics of Avoidability

SHARICK v. SOUTHEASTERN UNIVERSITY OF HEALTH SCIENCES, INC.

District Court of Appeal of Florida, Third District, 2000

780 So. 2d 136

SORONDO, J.

Keith M. Sharick, a fourth-year medical student, was dismissed from the College of Osteopathic Medicine (Southeastern), when he was given a failing grade in the final course he required for graduation, a rural rotation in general medicine at the Clewiston Community Health Center. Following several unsuccessful appeals within the university's review process, Sharick filed a complaint, which was amended several times, alleging multiple tort and contract claims against Southeastern. The only claim that ultimately went before the jury was breach of implied-in-fact contract. The trial court disallowed Sharick's claims for specific performance and past and future lost earning capacity and only permitted the jury to consider damages with respect to tuition expenses. The jury found for Sharick, concluding that Southeastern's decision to dismiss him was arbitrary, capricious, and/or lacking any discernable rational basis, and awarded a partial reimbursement of the tuition paid to Southeastern. Sharick now appeals, claiming that the trial court erred in denying him the right to plead and prove loss of future earning capacity. We reverse.

“The relation between a student and an institution of learning privately conducted, and which receives no aid from the public treasury, is solely contractual in character.” *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 517, 102 So. 637, 640 (1924). “It is generally accepted that the terms and conditions for graduation are those offered by the publications of the college at the time of enrollment. As such, they have some of the characteristics of a contract between the parties, and are sometimes subject to civil remedies in courts of law.” *University of Miami v. Militana*, 184 So.2d 701, 704 (Fla. 3d DCA 1966).

We begin our analysis by acknowledging that state and federal courts have historically distinguished between the judicial fact finding process and academic judgment regarding the performance of students, particularly when considering whether a student is qualified to be a physician. *See generally Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88–92, 98 S.Ct. 948, 55 50.Ed.2d 124 (1978)(determination of whether to dismiss student for academic reasons based upon judgment that student did not have the necessary clinical ability to perform adequately as medical doctor requires expert evaluation and is not readily adapted to procedural tools of judicial or administrative decision making); *Militana v. University of Miami*, 236 So.2d 162, 164 (Fla. 3d DCA 1970)(*quoting Connelly v. University of Vt. & State Agric. College*, 244 F.Supp. 156, 160–61 (D.C.D.Vt.1965))(“A medical school must be the judge of the qualifications of its students to be granted a degree; Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.”).

Accordingly, judicial review of a private educational institution's determination of academic performance in this context is limited to whether the challenged determination was arbitrary and capricious, irrational, made in

bad faith, or in violation of constitution or statute. *See Hunt*, 88 Fla. at 518–19, 102 So. at 640–641 (“a mere mistake of judgment on the part of a school officer in governing his school, either as to his duties or as to facts submitted to him, does not make him liable, but it must be shown that he acted in the matter complained of wantonly, willfully or maliciously.”); *Montalvo v. University of Miami*, 705 So.2d 1042, 1043 (Fla. 3d DCA 1998); *Militana*, 236 So.2d at 164.

In this case, the jury found that the university's decision to dismiss Sharick was arbitrary, capricious, and/or lacking any discernable rational basis. This determination is supported by competent, substantial evidence. Southeastern has not challenged the propriety of the adverse jury verdict on cross-appeal. Therefore, the sole issue presently before the court is the appropriate measure of damages for Sharick's wrongful dismissal less than two months prior to when he expected to graduate and obtain his degree as a doctor of osteopathic medicine (DO).(Footnote omitted).

* * *

Alternatively, we recognize the potential for mitigation of damages if Sharick fails to establish that it would be impossible for him to obtain a DO degree at another institution. In that event, the appropriate measure of damages would only be the reproduction cost of acquiring the degree elsewhere. This would include a calculation of the present value of his lost income during the time period needed to acquire the degree, coupled with the tuition and associated costs incurred at the new school. *See generally Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir.1989)(upholding $25,000 damage award to nursing student wrongfully expelled by school which was equivalent to lost salary for year in which her education was delayed); *rev'd on other grounds,* 499 U.S. 225, 111 S.Ct. 1217, 113 50.Ed.2d 190 (1991), *damages reinstated on remand*, 938 F.2d 315 (1st Cir.1991); *Fussell v. Louisiana Bus. College of Monroe, Inc.*, 519 So.2d 384, 387–88 (La.Ct.App.1988).

Accordingly, this case is reversed and remanded for a new trial on damages consistent with this opinion.

Notes

(25) The Federal District Court for the Southern District of Florida declined to extend the *Sharick* holding on the basis that a university’s refusal to award a psychology degree based on ethical violations had a rational basis and was therefore not arbitrary or capricious. *See McCawley v. Universidad Carlos Albizu, Inc.*, 461 F. Supp. 1251 (2006).

(26) The *Sharick* case includes interesting discussion on certainty of damages and particularly of modifications to requirement of certainty, and the fact that damages that may be hard to calculate but are clearly suffered are properly awardable if there is any "yardstick" by which such hard-to-calculate damages may be calculated. Does the "yardstick" discussion in Chapter IX come to mind?

(27) Florida courts carefully distinguish between a duty to mitigate damages and the inability to collect damages that could have readily been avoided in the context of eminent domain proceedings as well. *See System Components Corp. v. Florida Dep't of Transp.* 14 So. 3d 967, 982 (Fl. Sup. Ct. 2009). In the context of avoiding unnecessary damages to a business whose location is partially being taken away by eminent domain, courts apply the doctrine of avoidable consequences or "cost-to-cure" based on a statutory requirement. The idea is that where only part of a business's location is being condemned, and the business can therefore continue to operate and consequentially not lose value such as "good will," only true losses are compensable. An example of a reasonable work-around would be the rental of some new and nearby storage space because the remaining parcel not being condemned is not large enough for the business's storage needs. Would it not be better to have a clear calculation of reliance (the post-breach kind) damages than to attempt to ascertain the loss of profits and goodwill?

(28) Though the scholastic relationship between student and educational institution is contractual in nature, it is more complicated than that. It is interesting to note that the court in *Sharick* utilizes a special standard of reviewing decisions of college administrators – that of "arbitrary and capricious, irrational, made in bad faith, or in violation of constitution or statute." It is not the purpose of this contract law book to comprehensively cover the administrative law/court procedures distinction. A thought or two about this may nevertheless be helpful in planting the seed of something important to know. There are legislative and executive institutions created within federal, state, and local governments that are staffed with experts who are charged with day-to-day operations of highly specialized matters. Examples

include departments of health, worker compensation and worker safety boards and bureaus, tax departments, and even zoning boards. Courts in court proceedings try not to second-guess these experts when an appeal from one of these "administrative decisions" reach an Article III court. Thus, judicial review is not of competence or expertise. Rather, judicial review is whether there was some flaw in how the respective administrative unit reached its conclusions. Was there arbitrary or capricious behavior? Did an administrative officer or tribunal act in contravention of constitutional or legislative parameters (often referred to as actions *ultra vires*)? One interesting difference is that some administrative relationships are established by law and nurture a not insignificant judicial respect for administrative expertise, while others, as with a public educational institution, are established by contract.

Problem 10-3

Frank's Fences entered into a contract where Lazy Lumber would supply it with 100 two-by-fours by the first of every month for $400 per shipment in order to construct fences for customers. The first month, Lazy Lumber delivered that month's lumber and realized that the lumber was partially rotten. The second month, Lazy Lumber timely sent that month's shipment of lumber and when Frank's Fences inspected the goods, it discovered that again the wood was partially rotten. After a total of four months of receiving partially rotten lumber, Frank's Fences considered using another local lumber distributer, but decided to stay with Lazy Lumber and hope that the shipments would improve. After receiving partially rotten lumber for a few more months, Frank's Fences' customers began complaining about the quality of fences and Frank's Fences' business began to decline. Frank's Fences decided that it was finally time to sue Lazy Lumber for breach of contract for selling it the rotten wood. What result? Would your answer change if Frank's Fences had chosen the alternate lumber distributor? For how many months? (Note: no need yet to address U.C.C. § 2-612, FLA. STAT. § 672.612 (2017), which will be addressed later in Chapter 11. Can you glean the answer based on common law principles from this Chapter? This brings up an important point – in many aspects, U.C.C. Article 2 damages share similarities with common law one, although there are some unique distinctions and different terminology).

Note

For approximately two decades, Florida courts applied an *economic loss rule* to prohibit punitive damages requests where the only real damages sought

were based on warranty/contracts claims. Excessive use of the rule has been recently reigned in by the Florida Supreme Court.

B. The Economic Loss Rule

**TIARA CONDOMINIUM ASSOCIATION, INC. v.
MARSH & MCCLENNAN COMPANIES, INC.**

Supreme Court of Florida, 2013

110 So. 3d 399

* * *

ANALYSIS

Origin and Development of the Economic Loss Rule

"The exact origin of the economic loss rule is subject to some debate and its application and parameters are somewhat ill-defined." *Moransais v. Heathman*, 744 So.2d 973, 979 (Fla.1999). In its simplest form, we noted, the rule appeared initially in both state and federal courts in products liability type cases. Id. at 979. A historical review of the doctrine reveals that it was introduced to address attempts to apply tort remedies to traditional contract law damages. In *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla.1993), we recognized the economic loss rule as "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." *Id.* at 1246 (*quoting* Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.50.Rev. 891, 894 (1989)). We have defined economic loss as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Casa Clara*, 620 So.2d at 1246 (*quoting* Note*, Economic Loss in Products Liability Jurisprudence*, 66 Colum. 50.Rev. 917, 918 (1966)). We further explained that economic loss

> includes "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages–Tort or Contract?*, 114 U. Pa. 50.Rev. 539, 541 (1966). In other words, economic losses are "disappointed economic expectations," which are protected by contract law, rather than tort law. *Sensenbrenner*

v. Rust, Orling & Neale Architects, Inc., 236 Va. 419, 374 S.E.2d 55, 58 (1988); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 745 P.2d 1284 (1987).

Casa Clara, 620 So.2d at 1246.

Simply put, the economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532, 536 (Fla.2004). The rule has its roots in the products liability arena, and was primarily intended to limit actions in the products liability context.

Despite its underpinnings in the products liability context, the economic loss rule has also been applied to circumstances when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract.

Contractual Privity Economic Loss Rule

"The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Am. Aviation*, 891 So.2d at 536 (*citing Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 494 (Fla. 3d DCA 1994) ("Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort."). When the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract. *Am. Aviation*, 891 So.2d at 536–37); *Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d 100, 103 (Fla. 4th DCA 1969) ("[N]o cause of action in tort can arise from a breach of a duty existing by virtue of contract.").

The contractual privity application of the economic loss rule is best exemplified by our decision in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla.1987).(Footnote omitted). There, AFM entered into an agreement with Southern Bell that included placing AFM's advertising in the yellow pages. *See id.* at 180. However, Southern Bell listed an incorrect phone number for AFM, causing AFM economic damages. *See id.* In asserting a claim for economic losses, AFM chose to proceed solely on a negligence theory in the trial court below rather than base its theory of recovery on any agreement between the parties. *See id.* at 181. In determining that AFM could not recover economic losses based on a tort theory, this Court noted that AFM's contract with Southern Bell "defined the limitation of liability through bargaining, risk acceptance, and compensation."

Id. Because AFM had not proved that Southern Bell committed a tort independent of the breach of contract, this Court concluded that AFM had no basis for recovery in negligence. *See id.*

Subsequently, in American Aviation, we recognized that despite the general prohibition against a recovery in tort for economic damages for parties in privity of contract, we have allowed it in torts committed independently of the contract breach, such as fraud in the inducement. *See* 891 So.2d at 537. For example, in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238 (Fla.1996), we stated:

> The economic loss rule has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract action. Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from the acts that breached the contract. Fraudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract.

Am. Aviation, 891 So.2d at 537 (*quoting HTP, Ltd.*, 685 So.2d at 1239 (citations omitted)). *See also PK Ventures, Inc. v. Raymond James & Assocs.*, 690 So.2d 1296 (Fla.1997) (economic loss rule did not preclude a cause of action by the buyer of commercial property against the seller's broker for negligent misrepresentation).(Footnote omitted).

Another situation in which this Court has determined that public policy dictates that liability not be limited to the terms of the contract involves cases such as those alleging neglect in providing professional services. *See, e.g., Moransais*, 744 So.2d at 983 ("While provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve per se to bar an action for professional malpractice.").

Products Liability Economic Loss Rule

Although the economic loss rule has, over time, been extended to the contractual privity context, the roots of the rule may be found in the products liability context. The products liability economic loss rule developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law. *Am. Aviation*, 891 So.2d at 537–38. As the theory of strict liability replaced the theory of implied warranties with regard to actions based on defective products that resulted in personal injury, the issue arose as to whether the courts should permit a cause of action in tort by one who suffered purely economic loss due to a defective product. *Id*. at 539. For those who were in contractual privity, actions based on breach of warranty continued as the viable method if the only damages were economic in nature. Id. But for those who were not in

contractual privity and who sustained economic losses as a result of defective products, the question became what theory of recovery would be proper. *Id.*

The development of Florida's products liability economic loss rule can be traced to two cases: *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145, 149 (1965), and *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871, 106 S.Ct. 2295, 90 50.Ed.2d 865 (1986). * * *

* * *

Relying on the reasoning in *Seely* and *East River*, this Court adopted the products liability economic loss rule, precluding recovery of economic damages in tort where there is no property damage or personal injury, in *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899 (Fla.1987), our seminal case on the applicability of the economic loss rule. Florida Power & Light (FPL) entered into contracts with Westinghouse in which Westinghouse agreed to design, manufacture, and furnish two nuclear steam supply systems, including six steam generators. FPL discovered leaks in all six generators. FPL brought suit, alleging that Westinghouse was liable for breach of express warranties in the contracts and for negligence, and sought damages for the cost of repair, revision, and inspection of the steam generators. *Id.* at 900.

In determining whether Florida law permitted FPL to recover the economic losses in tort without a claim for personal injury or separate property damage, this Court considered the policy issues supporting the application of a rule that limits tort recovery for economic losses when a product damages itself. Id. Concluding that warranty law was more appropriate than tort law for resolving economic losses in this context, the Court adopted the holding in East River that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." *Florida Power*, 510 So.2d at 901 (*quoting East River*, 476 U.S. at 871, 106 S.Ct. 2295). Thus, as we reaffirmed in *American Aviation*:

> The economic loss rule adopted in Florida Power represents this Court's pronouncement that, notwithstanding the theory of strict liability adopted in West,4 strict liability has not replaced warranty law as the remedy for frustrated economic expectations in the sale of goods. In exchange for eliminating the privity requirements of warranty law and expanding the tort liability for manufacturers of defective products which cause personal injury, we expressly limited tort liability with respect to defective products to injury caused to persons or damage caused to property other than the defective product itself.

Am. Aviation, 891 So.2d at 541. We also noted that "the products liability economic loss rule articulated in *Seely* and *East River*, and adopted by this

Court in *Florida Power*, applies even in the absence of privity of contract." *Id*. (*citing Airport Rent–A–Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628, 631 (Fla.1995) (holding cause of action for negligence against manufacturer of defective buses was barred by the economic loss rule notwithstanding absence of privity)); *see also Casa Clara*, 620 So.2d at 1248 (holding cause of action against manufacturer of defective concrete was barred by the economic loss rule notwithstanding absence of privity).

Simply stated, "[t]he essence of the early holdings discussing the rule is to prohibit a party from suing in tort for purely economic losses to a product or object provided to another for consideration, the rationale being that in those cases 'contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage.' " *Moransais*, 744 So.2d at 980 (*citing Florida Power*, 510 So.2d at 902). Such was the reasoning in *East River*, *Seely*, and ultimately, *Florida Power*.

An examination of the application of the economic loss rule in Florida from its inception to our ruling in *Florida Power*, reveals that this Court adhered strictly to the reasoning of *East River* and *Seely*. Subsequent to our ruling in Florida Power, however, we issued a number of rulings which, as aptly stated in *Moransais*, "appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent." *Moransais*, 744 So.2d at 980. For example, in *AFM*, as previously discussed, we extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional service context. *See AFM*, 515 So.2d at 181. We also noted in *Moransais*, that "[w]hile we continue to believe the outcome of [AFM] is sound, we may have been unnecessarily over-expansive in our reliance on the economic loss rule as opposed to fundamental contractual principles." *Moransais*, 744 So.2d at 981.

In *Casa Clara*, we held that the economic loss rule barred a cause of action in tort for providing defective concrete where there was no personal injury or damage to property other than to the product itself.(Footnote omitted). *Casa Clara*, 620 So.2d at 1248. In *Airport Rent–A–Car*, we followed the reasoning in Casa Clara in holding the economic loss rule barred a cause of action for negligence against the manufacturer of defective buses where the only damage alleged was to the buses themselves. *Airport Rent–A–Car*, 660 So.2d at 630–31.

In *American Aviation*, in recognizing our history of unprincipled extension of the rule, we concluded that the economic loss rule should be expressly limited to the original rationale and intent of *Seely*, *East River*, and *Florida Power*, and held that a manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself. *Am. Aviation*, 891 So.2d at 542. "In other words, we reaffirm our recognition of the products liability economic loss

rule." *Id*. at 543. Despite this recognition, we expressly noted that the "other property" exception to the products liability economic loss rule remained viable. Id. In addition to the "other property" exception, we also reaffirmed that in cases involving either privity of contract or products liability, the other exceptions to the economic loss rule that we have developed, such as for professional malpractice,(footnote omitted) fraudulent inducement,(footnote omitted) and negligent misrepresentation,(footnote omitted). or free-standing statutory causes of action still apply.(Footnote omitted). *Am. Aviation*, 891 So.2d at 543. We expressly emphasized, "[t]hese exceptions remain untouched by our ruling today." *See id*.

Thus, despite our effort to roll back the economic loss rule to its products liability roots, we left untouched a number of exceptions which continue to extend the application of the rule beyond our original limited intent.

A Legacy of Unprincipled Expansion

For some time, as reflected by the foregoing discussion, this Court has been concerned with what it perceived as an over-expansion of the economic loss rule. We began expressing this concern in *Moransais*, where we noted our refusal to extend its application to actions based on fraudulent inducement and negligent representation cases. *Id*. at 981 (*citing PK Ventures* (negligent misrepresentation); *HTP* (fraudulent inducement)). We observed,

> the [economic loss] rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis. We hesitate to speculate further on situations not actually before us. The rule, in any case, should not be invoked to bar well-established causes of actions in tort, such as professional malpractice.

Moransais, 744 So.2d at 983 (footnote omitted). Five years later, in *American Aviation*, we reaffirmed our concern with the over-expansion of the rule and again noted that the economic loss rule should be expressly limited. We emphasized this concern with the following statement:

> Several justices on this Court have supported expressly limiting the economic loss rule to its principled origins. In *Moransais*, Justice Wells stated "directly that it is [his] view that the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product." *Moransais*, 744 So.2d at 984 (Wells, J., concurring). Two justices subsequently joined Justice Wells when he reiterated this position in *Comptech International, Inc. v. Milam Commerce Park, Ltd*., 753 So.2d 1219 (Fla.1999). *See id*. at 1227 (Wells, J., concurring with an opinion in which Justices Lewis and Pariente joined).

Am. Aviation, 891 So.2d at 542. Thus, in *Moransais*, *Comptech*, and *American Aviation*, this Court clearly expressed its desire to return the economic loss rule to its intended purpose—to limit actions in the products liability context. In each instance, however, we left intact a number of exceptions that continue the rule's unprincipled expansion. We simply did not go far enough.

Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability. The Court will depart from precedent as it does here "when such departure is 'necessary to vindicate other principles of law or to remedy continued injustice.' " *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1131 (Fla.2005) (*quoting Haag v. State*, 591 So.2d 614, 618 (Fla.1992)). Stare decisis will also yield when an established rule has proven unacceptable or unworkable in practice. *See Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 55 So.3d 567, 574 (Fla.2010). Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice. Thus, today we return the economic loss rule to its origin in products liability.

CONCLUSION

Because we now limit the application of the economic loss rule to cases involving products liability, it is not necessary for us to decide whether the economic loss rule exception for professionals applies to insurance brokers. Based on the foregoing, we answer the rephrased certified question in the negative and hold that the application of the economic loss rule is limited to products liability cases. Having answered the rephrased certified question, we return this case to the Eleventh Circuit Court of Appeals.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.

PARIENTE, J., concurs with an opinion, in which LEWIS and LABARGA, JJ., concur.

POLSTON, C.J., dissents with an opinion, in which CANADY, J., concurs.

CANADY, J., dissents with an opinion, in which POLSTON, C.J., concurs.

PARIENTE, J., concurring.

I concur with the majority's principled conclusion that the economic loss rule is limited to the products liability context. I write to address Justice Canady's assertion in dissent that the Court's decision represents a "dramatic unsettling of Florida law," dissenting op. at 413 (Canady, J.), and to explain

that the majority's conclusion is fully consistent with the development of this Court's jurisprudence on the applicability of the economic loss rule in Florida.

* * *

Notes

26. The take-away is that whereas contract law disfavors punitive and windfall damages, one may always separately plead and prove a right to tort recovery based on the same facts and in the same pleading. Whether the problem was that lawyers “ask for the moon and stars” for damages on the one hand, or judicial shortcutting on the other, the Florida Supreme Court has made clear that limiting damages to contractual ones out-of-hand is not appropriate where there is another basis for ultra-contractual damages.

27. There is public policy behind consumer protection or “blue sky” laws (discussed in Chapter IX) that was extended beyond its intended scope by the Florida courts. In short, courts determined that the economic losses arising from products liability were limited to warranty damages to the exclusion of exotic claims for damage in tort for negligence and other tort-based theories. Absent special proof of damage to person or property, no tort claims would lie. The Florida courts latched onto this as a *rule of convenience* and began to prohibit tort claims generally in contracts actions far outside the products liability area (on the basis that only economic losses were actually being sought). No doubt this proved to be expedient, but the origins of the economic-loss rule were never really intended to bar tort claims asserted alongside contracts claims generally, so long as the elements of tort liability are separately pleaded and proved. The blanket prohibition of torts claims in contracts actions was therefore disavowed by the majority in *Tiara Condominium* and limited to its origin – products liability cases. For further discussion of the *Tiara Condominium* case, *see* Paul J. Carrier, *Potemkyn’s Village on the Divorce River: The Façade of Macar v. Macar*, 33 W. MICH. U. COOLEY LAW REVIEW 295, 312-316 (2016).

28. It may be interesting to note that this case reached the Florida Supreme Court by certification of the Eleventh Federal Circuit Court of Appeals. This is a second way that cases reach the Florida Supreme Court. Another way, for resolving conflicts between state District Courts of Appeal, is discussed in Chapter 9.

29. How does the contractual privity issue impact products liability cases? The answer to this question would assist practitioners in crafting the bases of potential recovery in breach-of-contract cases.

30. The *economic loss rule* developed as a way to reign in the proliferation of damages claims in contract cases. A key reason behind the proliferation, which led to the creation of the economic loss rule, may be gleaned from something that the *Brock v. Gale* court addressed at the point where the excerpt references the famous *Hadlee v. Baxendale* case. Can you discern what may have triggered this proliferation? Might it be related to contractual parties' ability to agree on limitation or exclusion of damages in the face of foreseeability?

4. Liquidations, Limitations, and Exclusions of Remedy

If done correctly, parties may limit or even exclude remedies that are not against law or public policy. In the end, if all parties know the score, and the price reflects the shifting of risk, where is the damage? Be careful of this thinking, however, in the case of U.C.C. Article 2's "perfect tender rule."

A. Liquidated Damages

Parties to a contract may predict the likely losses in case of breach and include a liquidated damages clause in their contracts to dispel with the need of establishing the amounts of damage in post-breach proceedings. The general requirements for upholding liquidated damages clauses, which if not carefully crafted could be deemed impermissible *punitive damages*, are (1) not readily ascertainable at time of contracting; and (2) reasonably if not perfectly approximating the likely damages in case of breach. (There is a third, i.e., that a damages estimate cannot be punitive). Worthy of note is that Florida's commercial law on liquidated damages is the same as its common law requirements, with the apparent addition of assessing the reasonableness of the liquidated amount based on the actual harm assessed after a breach. *See* FLA. STAT. § 672.718 (1) (2017).

(i) Basic Requirements

BILL HEARD LEASING, INC. v. ROCCO ENTERPRISES, INC.

District Court of Appeal of Florida, Second District, 1976

McNULTY, Chief Judge.

We reverse a final judgment wherein the trial court refused to award contractual liquidated damages resulting from breach of a lease.

In February 1974, appellant Bill Heard Leasing, Inc., (Heard) entered into a truck lease and service agreement with appellee Rocco Enterprises, Inc., (Rocco) for the leasing of a vehicle specifically purchased, painted, and equipped for Rocco. The contract provided for weekly lease payments of a fixed amount plus a mileage charge, and Rocco's obligations thereunder were guaranteed by appellee, John R. Rocco, Jr., personally.

By December 1974 the lease payments pursuant to the contract were over four months in arrears. In spite of repeated requests by Heard to bring the account current, the arrearages grew steadily larger.

Heard notified Rocco and John R. Rocco, Jr., that it intended to exercise the termination option contained in the contract and that if payment of arrearages was not promptly remitted Heard would seek the damages specified in paragraph 21 thereof which, in addition to rental arrearages, provides that such damages were to be based on the contractually specified depreciated value of the vehicle on the date of termination, less the salvage value, plus all incidental costs. [Footnote omitted] Rocco had the option to avoid these damages totally by purchasing the vehicle at the depreciated value. Rocco did not opt to purchase the vehicle at the precomputed price, nor were any rental payments made thereafter. The arrearages continued to grow and, after repeated demands, Heard finally brought this action seeking the damages provided for in paragraph 21.

At trial, the executed contract and guarantee were not contested and, after resolving some minor discrepancies, the amount of the lease payment arrearages was agreed upon. The mailing and receipt of the plaintiff's demands for payment of arrearages, election to terminate the contract, and demand for purchase of the vehicle in question were all acknowledged by the defendants. Further, the plaintiff's evidence of the reasonable salvage value of the vehicle at the time of termination was not controverted.

Although the trial judge found that Rocco had breached the contract by failing to pay the lease payments when due, he refused to award Heard the damages as provided for in paragraph 21, apparently because he determined them to constitute a forfeiture rather than 'liquidated damages.' We disagree.

The law is clear that when the damages a party may sustain in the event of a breach of contract are not readily ascertainable, are uncertain, or are not easily susceptible of proof, a contractual provision specifying the computation of such damages assists all parties involved in determining their obligations in the event of a breach. [Footnote omitted] In general, so long as a liquidated damages clause is reasonable under the circumstances, provides for a computation of damages which are by their nature uncertain, and so long as it is apparent that the parties intended the clause to provide for such damages and not merely to be a penalty against the breaching party, then it will be enforceable. [Footnote omitted]

Here, only certain elements of the damages, the lease payment arrearages, are readily ascertainable. The damages resulting from the other aspect of such a breach, however, viz., the retaking, refurbishing, storing, or hopefully re-leasing of the vehicle in question, are not readily ascertainable. Additionally, the vehicle itself was a 'custom' vehicle, specially prepared and equipped for Rocco, and thus obviously limited in resale or salvage value. Under the circumstances, we think the precomputed formula for ascertaining damages was reasonable; and the contracting parties clearly recognized this. It was error for the trial court not to.

In view whereof, the judgment appealed from should be, and it is hereby, reversed; and the cause is remanded for further proceedings not inconsistent herewith.

BOARDMAN and GRIMES, JJ., concur.

An example of a situation where exact damages are not readily ascertainable at the time of contracting is any market with quickly fluctuating prices.

(ii) Deposit Forfeitures That Are Not Punitive (Also Demonstrating The Difficulty of Ascertainment Requirement)

HOT DEVELOPERS, INC. v. WILLOW LAKE ESTATES, INC.

District Court of Appeal of Florida, Fourth District, 2007

950 So. 2d 537

GROSS, J.

* * *

We state the facts in the light most favorable to Hot Developers. In May 2005, Hot Developers, as buyer, and Willow Lake Estates, Inc., as seller, entered

into an agreement for purchase and sale of commercial real estate for $5,700,000. Both sides were represented by counsel. The agreement contained no provision making the sale conditional upon financing. The closing date was July 8, 2005; the agreement contained a “time is of the essence” provision.

Section 2.1 of the agreement required Hot Developers to deposit $100,000 into its attorney's trust account upon the signing of the contract. There was a due diligence period during which Hot Developers had the option to cancel the agreement for any reason whatsoever and receive a return of its deposit. Section 2.2 of the agreement called for Hot Developers to make a second deposit of $200,000 at the conclusion of the due diligence period. Hot Developers paid both deposits. Afterwards, Hot Developers obtained an appraisal that erroneously undervalued the property at $3,000,000.

The agreement required that closing “take place no later than 45 days after the expiration of the Due Diligence Period, unless otherwise extended pursuant to the provisions of § 2.4.” Pursuant to section 2.4, Hot Developers extended the closing date to August 1, 2005. Under section 2.4, as consideration for the closing date extension, Hot Developers directly paid Willow Lake $250,000. Section 2.4 described this money as “an additional non-refundable deposit” which “shall not be held in escrow and shall instead be immediately released to Seller (and credited toward the total purchase price).” Containing a “time is of the essence” provision, section 2.4 provided that Hot Developers would be in default if it failed to close on or before August 1, 2005.

Hot Developers was unable to close on August 1 because of the error in the first appraisal. Although the agreement contained no provision allowing Hot Developers to extend closing beyond August 1, Hot Developers sought a second extension. Hot Developers and Willow Lake negotiated the terms of an addendum to the agreement. The addendum extended the closing date to “Wednesday, August 24, 2005, time being absolutely of the essence.” Hot Developers agreed to release the escrowed deposits of $100,000 and $200,000 to Willow Lake pursuant to Section 3.1 of the addendum, which provided:

> Buyer directed its attorney to release, and pay by wire transfer to seller on or before 5:00 p.m. on Monday, August 1, 2005, to seller an additional deposit of $300,000, which deposit shall be non-refundable, all other provisions of the Agreement for Purchase and Sale to the contrary notwithstanding.

Hot Developers was again unable to close on August 24 because it had not yet secured a second appraisal.

* * *

At oral argument, Willow Lake contended that Hot Developers purchased closing date extensions, so that under *Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So.2d 35 (Fla. 2d DCA 2003) the deposits were not refundable under the terms of the agreement and the addendum. Waksman observed that it

> is entirely reasonable for a seller to exact from the buyer a payment-which the buyer cannot recover except as a credit at closing-to compensate the seller for keeping the seller's property off the market for a period of time that extends beyond the time for closing initially contemplated and agreed to by the parties.

Id. at 41. However, *Waksman* also acknowledged that "a deposit forfeiture provision may constitute an unenforceable penalty in certain circumstances," *citing to Hyman v. Cohen*, 73 So.2d 393, 401 (Fla.1954), and *Lefemine v. Baron*, 573 So.2d 326, 329 (Fla.1991). Waksman, 862 So.2d at 42. Waksman recognized that the party challenging the deposit forfeiture in that case had raised only an "argument concerning the proper interpretation" of a contract, and not an argument that the forfeiture was "otherwise unenforceable" under the rule of *Hyman v. Cohen*. *Id.*

This case differs from *Waksman*, because Hot Developers attacks the enforceability of the deposit forfeiture provisions of the agreement and addendum. This court has held that a forfeiture provision in a contract, similar to one calling for a non-refundable deposit in exchange for a closing extension, must be analyzed under the principles of *Hyman v. Cohen*. Thus, in *Hawk's Cay Investors, Ltd. v. Brandy Marine of the Keys, Inc.*, 524 So.2d 681, 683-84 (Fla. 4th DCA 1988), we applied a Hyman v. Cohen liquidated damages analysis to evaluate a provision in a marina management agreement that allowed the owner to terminate the agreement for a termination fee of $80,000. *Hawk's Cay* relied upon *Dade National Development Corp. v. Southeast Investments of Palm Beach County, Inc.*, 471 So.2d 113 (Fla. 4th DCA 1985), where this court analyzed provisions in real estate sales contracts that required the seller to pay the buyer $200,000 if the seller cancelled the contract within six months of the execution date.

We agree with Willow Lake that the agreement and addendum provided that the deposits were non-refundable after Hot Developers failed to close. Proper analysis does not stop with an interpretation of the agreement and addendum. The rule of *Hyman v. Cohen* is "to allow ... liquidated damage clause[s] [such as the non-refundable deposit provisions] to stand if the damages are not readily ascertainable at the time the contract is drawn," and the amount of liquidated damages is not "grossly disproportionate" to what might be expected to result from the buyer's breach, but "to permit equity to relieve

against the forfeiture if it appears unconscionable in light of the circumstances existing at the time of breach." *Hutchison v. Tompkins*, 259 So.2d 129, 132 (Fla.1972); *Hyman*, 73 So.2d at 401.

Because the "land sale market in Florida fluctuates from year to year and season to season," Florida recognizes that "it is generally impossible" to say at the time a contract is executed what the seller's loss will be if the buyer fails to close. [Footnote omitted] *Hutchison*, 259 So.2d at 132. Less than ten percent of the purchase price, the non-refundable deposits in this case were not "so grossly disproportionate to any damages that might reasonably be expected to follow" from the buyer's failure to close, such that the parties could have "intended only to induce full performance ... rather than to liquidate their damages." *Hyman*, 73 So.2d at 401.

Arising from a real estate contract, the non-refundable deposit provisions in this case satisfied the rule of *Hyman v. Cohen* and are properly characterized as enforceable liquidated damages provisions, and not as penalties. Two commercial entities, with no suggestion of an imbalance of bargaining power between them, should be free to fashion a transaction where the seller exacts from the buyer "payment-which the buyer cannot recover except as a credit at closing-to compensate the seller for keeping the seller's property off the market for a period of time that extends beyond the time for closing initially contemplated" by the parties. *Waksman*, 862 So.2d at 41. A policy that encourages courts to freely invalidate such provisions would substantially undermine "the commercial value of contractual arrangements." *Steinhardt v. Rudolph*, 422 So.2d 884, 890 (Fla. 3d DCA 1982) (*quoting* 14 Samuel Williston, A Treatise on the Law of Contracts § 1632 (3d ed.1972)).

The second aspect of the *Hyman v. Cohen* rule requires the court to determine whether equity should intervene to relieve a party of a forfeiture that "appears unconscionable in light of the circumstances existing at the time of breach." *Hutchison*, 259 So.2d at 132. The supreme court has identified two factors that support the finding that a forfeiture is unconscionable: (1) that the buyer's "failure to fulfill the contract was due to any misfortune beyond his control" and (2) that the seller received a benefit, "the retention of which was shocking to the conscience of the court." *See Beatty v. Flannery*, 49 So.2d 81, 82 (Fla.1950).

This case presents no factors supporting a finding of unconscionability at the time of the breach in August, 2005. Where, as here, the liquidated damages figure was a fair estimate of potential, actual damages when the contract was made; relatively little time passed between contract execution and breach; and no circumstances occurred wholly inconsistent with the parties' expectations, it is not surprising that the liquidated damages figure agreed to at the outset would not be unconscionable at the time of the breach. This was not a case where Willow Lake had already sold the property to another at a

minimal loss at a time when it sought to forfeit the $550,000. *See Hutchison*, 259 So.2d at 132. Although Hot Developers was unable to close because of a faulty appraisal that interfered with its financing, this did not make the forfeiture unconscionable. The commercial real estate sales contract was not contingent on financing; the agreement contained a due diligence period where the buyer had the right to terminate the contract and receive a refund of the deposit; the erroneous appraisal was not a circumstance beyond the buyer's control; and when it realized the mistake in the appraisal, Hot Developers did not try to avoid the agreement, but sought extensions to perform.

Under the case law, a significant factor in the unconscionability equation "is the amount of money being retained vis a vis the total contract price." [Footnote omitted] *Hooper v. Breneman*, 417 So.2d 315, 317 (Fla. 5th DCA 1982). Here, the $550,000 deposits are only 9.65% of the total contract price. This figure is well within the range of liquidated damages approved by Florida courts. *See Beatty*, 49 So.2d at 81-82 (holding that forfeiture of 10% of purchase price for buyer's breach of real estate sales contract was not unconscionable); *Bruce Builders v. Goodwin*, 317 So.2d 868, 870 (Fla. 4th DCA 1975) (approving liquidated damages that were 4.1% of the contract price); Dade Nat'l Dev. Corp., 471 So.2d at 116-17 (upholding forfeiture of cancellation fees totaling 11.82% under two contracts); *Bloom v. Chandler*, 530 So.2d 341 (Fla. 4th DCA 1988) (upholding a liquidated damages clause wherein the sellers retained a $49,500 deposit as liquidated damages on a contract for $225,000 or 22% of the purchase price); *Hooper*, 417 So.2d at 318 (upholding liquidated damages provision calling for forfeiture of 13.3% of the purchase price*); Johnson v. Wortzel,* 517 So.2d 42, 43 (Fla. 3d DCA 1987) (approving forfeiture of 18.2% of contract price); *Bradley v. Sanchez*, 943 So.2d 218, 222 (Fla. 3d DCA 2006) (finding that "forfeiture of 4.85% of the total sales price (or $510,000) as liquidated damages is not an unconscionable amount of damages"); *compare McNorton v. Pan Am. Bank of Orlando*, 387 So.2d 393, 397 (Fla. 5th DCA 1980) (holding that "retention of 50% of the purchase price paid as a deposit by a vendee in default" was "sufficiently shocking" to state a cause of action); *Berndt v. Bieberstein*, 465 So.2d 1264, 1266 (Fla. 2d DCA 1985) (disallowing as unconscionable liquidated damages of over 55% of the purchase price).

That the value of the property may have appreciated between May and August, 2005, does not render the forfeiture of the non-refundable deposits unconscionable. As the trial judge observed, focusing solely on an increase in market value of the property fails to take into consideration those intangible losses that a seller might suffer from taking the property off of the market. A liquidated damages provision permits the parties to agree at the outset of a contract on the amount of damages resulting from nonperformance so as to avoid extensive litigation if and when a breach occurs. The history of fluctuations in the Florida real estate market makes it "generally impossible"

to predict changes in value between the date of a contract and the closing months in the future. *Hutchison*, 259 So.2d at 132. In *Bruce Builders*, we held that a seller was entitled to liquidated damages even though it had sold the property in question for a net profit of approximately $2,500. 317 So.2d at 870.

On the remaining issue, we find no abuse of discretion in the trial judge's decision not to postpone the summary judgment hearing to allow further discovery.

Affirmed.

WARNER and POLEN, JJ., concur.

Notes

22. It is easy to imagine to public policy behind encouraging liquidated damages clauses. They ease the administration of the damages phase in post-breach proceedings. Knowing human nature, it is also easy to imagine the danger behind allowing liquidated damages clauses (consideration of which follows in the next subsection to this Chapter). A balance must be struck, and therefore a test must be developed. The basics of that test are set out in the introduction to this subsection and are also well developed in the *Bill Heard Leasing, Inc.* and *Hot Developers, Inc.* cases. Not so clear from the cases is the time when the validity of a liquidated damages clause is tested. Have you intuited what it is? Might it be an element of the "black letter law" on liquidated damages clause in one's outline?

23. The *Hot Developers, Inc*. case mentions the "Due Diligence Period." Future transactional lawyers especially should understand what this means. As parties negotiate a deal, there is often a get-to-know period where both sides exchange information on their respective businesses with the goal of reaching a mutually agreeable contractual arrangement. Lawyers, as well as accountants, engineers, etc., are often involved to check things out, for example whether a business owns or leases its land, whether a company is owned by many or just a few shareholders, what the taxes are and whether they have been paid, the existence of any potential environmental liability on the land of a company to be acquired, etc. Technically, the due diligence process is a facet of an "executory" phase in a contractual arrangement (explained in Chapter XX).

24. It may be helpful to draw a line between the paragraph in *Hot Developers, Inc.* just above the paragraph beginning "The second

aspect ….” The material above deals with legal damages, whereas the material below addresses the possibility of an equitable remedy (addressed further in Chapter XII).

25. There is a unique U.C.C Article 2 situation with attempts to limit damages found in its §2-719(2) (and its state-adopted counterparts). This book cannot cover all U.C.C. Article 2 subjects (some law schools cover this in a “Sales” course).

B. Exclusion of Damages

Typically, the issue of excluding (or limiting) damages is left to sale-of-goods cases, which is covered in Chapter 11. Perhaps sale-of-goods cases are simply more interesting. Then again, there is specific statutory treatment of excluding (or limiting) damages in states’ adoptions of U.C.C. Article 2. Nevertheless, it is possible to exclude damages even in common law contracts for things like services. By a large margin, the industry most often utilizing exclusions or limitations, and litigating these issues, is the insurance industry. (A significant majority of exclusion-of-remedy cases involving insurance contracts are federal cases – can you intuit the reason?) (Is there a reason why the term of art used here is “damages” and not “remedies”? Can parties shackle the courts from utilizing equitable remedies?)

There are in many jurisdictions public policies that disfavor *exculpatory* clauses, i.e., those that immunize a party from liability. This is especially true where there is some agency involved (one’s bank, one’s stockbroker, etc.). As one might expect, Florida courts that have addressed this issue recognize this policy, but would not apply the policy in situations where the exculpatory language is clear and the other party(ies) would be aware of the nature of the exculpation. *See, e.g., Give the Kids the World, Inc. v. Sanislo*, 98 So.3d 759 (Fla. 5th DCA 2012); *Rose v. ADT Sec. Services, Inc.*, 989 So.2d 1244 (Fla. 1st DCA 2008).

AUTO OWNERS INS. CO. v. VAN GESSEL

District Court of Appeal of Florida, Second District, 1995

665 So. 2d 263

RYDER, Acting Chief Judge.

The trial court entered summary final judgment in favor of the insureds in this declaratory judgment action involving the “family exclusion” clause of automobile liability and umbrella insurance policies. Because we hold that the abrogation of the doctrine of interspousal immunity did not invalidate the family exclusion clause, we reverse.

1. THE FACTS.

This lawsuit arose out of an automobile accident which occurred on March 26, 1993, when an automobile owned and operated by Peter F. Van Gessel collided with another motor vehicle. Mr. Van Gessel died as a result of the collision, and his wife, Dorothy E. Hough Van Gessel, a passenger, died a few weeks later as a result of injuries she sustained in the accident. Owners Insurance Company insured Mr. Van Gessel and his 1993 Lincoln Town Car under an automobile policy which was effective on November 18, 1992 for a term of six months. The policy provided $500,000.00 per person in bodily injury liability coverage and $25,000.00 per person in uninsured motorist coverage. The coverage was subject to certain exclusions including an exclusion for injury to family members. The family exclusion clause specifically provided that:

> Liability coverage [does not apply] to bodily injury to you or any person living in your household and related to you by blood, marriage or adoption.

Auto Owners Insurance Company insured Mr. Van Gessel under an executive umbrella policy which provided $500,000.00 per person in bodily injury liability coverage. It also contained a specific exclusion for personal injury to the insureds. The exclusion clause in the umbrella policy provided:

> We do not cover personal injury to you or a relative.

The personal representative of Mrs. Van Gessel's estate filed suit against the co-personal representative of Mr. Van Gessel's estate alleging that Peter F. Van Gessel negligently operated his vehicle causing his wife's death.

Pursuant to chapter 86, Florida Statutes, the insurance companies filed an action for a declaratory judgment against the co-personal representatives of the estate of Mr. Van Gessel and the personal representative of Mrs. Van Gessel's estate seeking to have the rights of the parties under the policies determined. The insurance companies filed a motion for summary judgment asking the court to declare that due to the family exclusion clauses there was no insurance coverage available under the terms of the policies for the claims brought by the wife's estate against the estate of the insured husband. The appellees also filed a motion for summary final judgment as to the existence of the insurance coverage. When the trial court indicated at the hearing that it

intended to deny the insurer's motion for summary judgment, the parties agreed that there remained no further questions of fact to be resolved and that the court's denial of the motion acted as a final adjudication in favor of the estates and against the insurers. There is no factual dispute between the parties. The sole issue here is the availability of insurance coverage under the terms of the policies despite the existence of the family exclusion clauses.

The lower court held that the supreme court's abrogation of the doctrine of interspousal tort immunity in *Waite v. Waite*, 618 So.2d 1360 (Fla.1993), represented "a fundamental change in the common law and that insurance companies can no longer contractually eliminate coverage through the use of 'family exclusion' clauses as those clauses are now void and against public policy." Accordingly, it entered summary final judgment in favor of the insureds declaring that insurance coverage is available under the terms of the policies.

2. THE FAMILY EXCLUSION CLAUSE IN LIABILITY AND UNDERINSURED MOTORIST INSURANCE COVERAGE.

No reported Florida decision has invalidated the family exclusion clause with respect to liability or underinsured motorist insurance provisions. In *Reid v. State Farm Fire & Cas. Co.,* 352 So.2d 1172 (Fla.1977), the supreme court upheld the family exclusion clause, declaring that;

> [i]t is generally accepted, in the absence of a statutory prohibition, that provisions of automobile liability insurance policies excluding from coverage members of the insured's family or household are valid. 46 A.L.R..3d 1024. This is also the rule in Florida. *Newman v. National Indemnity Company*, 245 So.2d 118 (Fla. 3d DCA 1971); *see also Zipperer v. State Farm Mutual Automobile Ins. Co.*, 254 F.2d 853 (5th Cir.1958). The reason for the exclusion is obvious: to protect the insurer from over friendly or collusive lawsuits between family members.

Reid at 1173. *See also Brixius v. Allstate Ins. Co.*, 589 So.2d 236 (Fla.1991) (upheld denial of coverage based on a family-household exclusion in the liability portion of the policy); *Chrysler Credit Corp. v. United Services Auto. Ass'n*, 625 So.2d 69 (Fla. 1st DCA 1993) (an insurance company may limit coverage by means of appropriate family member exclusion); *Prudential Property and Cas. Ins. Co. v. Bonnema*, 601 So.2d 269 (Fla. 5th DCA 1992) (family exclusion provisions in insurance policies are valid).

The family exclusion clause has been upheld in the context of uninsured motorist coverage. *See Reid*, 352 So.2d 1172; *Brixius*, 589 So.2d 236; *Fitzgibbon v. Government Employees Ins. Co.*, 583 So.2d 1020 (Fla.1991); *Nationwide Mutual Fire Ins. Co. v. Olah*, 662 So.2d 980 (Fla. 2d DCA 1995).

In *Florida Farm Bureau Ins. Co. v. Government Employees Ins. Co.*, 387 So.2d 932, 934 (Fla.1980), the supreme court also upheld the validity of family exclusion clauses and declared that:

> The Uniform Contribution Among Joint Tortfeasors Act does not purport to enlarge the coverage of insurance policies nor does it prohibit family exclusion clauses. We reject the contention that these clauses are void as against public policy. In addition to the policy reasons expressed in Reid, the court noted that insurance premiums may be established in part by reference to potential exposure to liability by insurance companies and may be lower where those most likely to be passengers in the automobile are expressly excluded from coverage.

3. THE FAMILY EXCLUSION CLAUSE IN OTHER JURISDICTIONS.

In other states, however, the outcome has been different. The application of the family exclusion clause has been widely litigated with varying results. In some states, the family or household exclusion has been upheld in attempts by insureds to recover automobile liability insurance in amounts exceeding the motor vehicle financial responsibility statute's minimum coverages. *See Martin v. Farmers Insurance Exchange*, 894 P.2d 618 (Wyo.1995); *Collins v. Farmers Ins. Co. of Oregon*, 312 Or. 337, 822 P.2d 1146 (1991); *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 479 (Mo.1992) (*en banc*). The Nebraska Supreme Court held that a household exclusion clause contained in a policy of motor vehicle liability insurance that is not used as proof of future financial responsibility under the Motor Vehicle Safety Responsibility Act does not violate the public policy of that state and is an enforceable provision in a policy of motor vehicle liability insurance. *State Farm Mut. Auto. Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993).

Other states, including Idaho, have invalidated the family exclusion clause up to the coverage limits of the specific automobile liability insurance policy. *Farmers Ins. Group v. Reed*, 109 Idaho 849, 712 P.2d 550 (1985). There, the Supreme Court of Idaho stated the issue very simply:\

> If there is intrafamily immunity in Idaho in the context of automobile accidents, then the household exclusion clauses are valid. If there is no intrafamily immunity shield, the household exclusion clauses are invalid statutorily and as against public policy.

Farmers Ins. Group, 109 Idaho at 851, 712 P.2d at 552.

State legislatures have also enacted legislation to clarify the parties' rights. In South Dakota, when a court ruling in *Cimarron Ins. Co. v. Croyle*, 479 N.W.2d 881 (S.D.1992), held that the household exclusion in an automobile liability policy was void as contrary to the financial responsibility law and public policy only as to the minimum coverage required by the statute, the legislature acted quickly to adopt a new policy which approved household exclusions as an exception to the general rule of mandatory liability coverage. *Brandenburg v. Allstate Ins. Co.*, 815 F.Supp. 317 (D.S.D.1993), *reversed as to uninsured motorist coverage of policy*, 23 F.3d 1438 (8th Cir.1994).
In addition to Florida, other states have also upheld the family exclusion clause. *See Allstate Ins. Co. v. Elwell*, 513 A.2d 269 (Me.1986); *State Farm Mutual Automobile Ins. Co. v. Falness*, 178 Ariz. 281, 872 P.2d 1233 (1994); *Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599 (Iowa 1983) (the exclusionary clause does not violate public policy to protect persons injured in motor vehicle accidents from financially irresponsible motorists in the absence of a legislative intent to require all motorists to have liability insurance); *Safeco Ins. Co. v. Seck*, 225 Ill.App.3d 397, 587 N.E.2d 1251, 167 Ill.Dec. 636 (2d Dist.1992) (abrogation of interspousal immunity reflects a public policy which speaks to legal empowerment rather than guaranteed insurance coverage).

The California Supreme Court has held that such an insurance policy exclusion clause was consistent with state public policy and that it did not violate principles of equal protection. *Farmers Ins. Exchange v. Cocking*, 29 Cal.3d 383, 628 P.2d 1, 173 Cal.Rptr. 846 (1981) (*en banc*). It concluded that the exclusion was consistent with a preexisting judicial rule founded upon freedom of contract and the insurer's legitimate interest in minimizing future losses attributable to fraud or collusion. The injured party retained the full unrestricted right to sue the negligent insured, and, therefore, it did not contravene the public policy that every person be responsible for his own negligent acts. The exclusion affected only the right to reach insurance proceeds for the satisfaction of any judgment obtained.

4. ANALYSIS.

The insurance companies argue on appeal that although the Waite decision fundamentally changed Florida's common law when it abrogated the doctrine of interspousal tort immunity, it did not affect the continuing validity of the family exclusion clause. They also argue that insurance companies have the same right as individuals to contractually limit their liability and to impose conditions upon their obligations. *See Canal Ins. Co. v. Giesenschlag*, 454 So.2d 88 (Fla. 2d DCA 1984), *review denied*, 462 So.2d 1106 (Fla.1985). They further assert that the public interest here does not reach the threshold required to strike down the family exclusion clause because it is not clearly injurious to the public good nor does it contravene some established interest of society.

The appellees respond that the supreme court declared in *Waite* that in the wake of *Sturiano v. Brooks*, 523 So.2d 1126 (Fla.1988), there was no longer a sufficient reason warranting a continued adherence to the doctrine of interspousal immunity, and, therefore, the doctrine no longer remained a part of Florida's common law. They argue that the court properly ruled because contractual terms are properly deemed invalid if to enforce them requires the court to thwart established public policy. *American Cas. Co. v. Coastal Caisson Drill Co.*, 542 So.2d 957 (Fla.1989); *Thomas v. Ratiner*, 462 So.2d 1157, 1159 (Fla. 3d DCA 1984), *review denied*, 472 So.2d 1182 (Fla.1985). They criticize all but one of the cases cited by the appellants as precedent prior to the Waite decision. They assert that the subsequent decision, Chrysler Credit, provides no authority because the doctrine of interspousal immunity was not implicated in that decision.

The appellees further contend that Auto Owners Insurance is protected from any impermissible impairment of contract because language included in the automobile policy protects the carrier from any detrimental changes affecting the policy from judicial decisions. The policy provision allows for a provisional or recalculated premium should areas of tort law previously exempt from liability become redefined by judicial decision. The umbrella policy did not follow form.

No Florida decision supports the invalidation of the family exclusion clause. Sturiano did not address the family exclusion clause. The Sturiano decision held that the doctrine of interspousal immunity did not bar an action against the estate of a husband whose wife was a passenger in a car driven by the husband where the husband was killed in the accident and none of the policy reasons supporting the doctrine were present such as fear of family or marital discord or the possibility of fraud or collusion. The policy was construed pursuant to New York law which prevented any recovery by the spouse unless the policy so specified. The Waite decision which abolished the doctrine of interspousal immunity apparently did not involve any insurance policy containing a family exclusion clause.

The appellees correctly note that the Chrysler Credit case did not address the doctrine of interspousal immunity. Instead, it involved the application of the family exclusion clause as between a minor's estate and his father's automobile policy, and is, therefore, clearly pertinent to the issue now before the court. Moreover, the public policy concerns found void in Waite are also present in the context of an exclusion for a family member, but these concerns raised in Waite were not subsequently addressed in the majority opinion in Chrysler Credit. Judge Gersten's dissent in Chrysler Credit raised the issue and recommended it be addressed by the supreme court and the legislature. Other decisions prior to Waite clearly emphasize the state's interest in the parties' freedom to contract and a judicial reluctance to extend insurance

coverage beyond the plain language of a policy. *See Florida Farm Bureau*; *Brixius*; *Bonnema*; *Fitzgibbon*. If exclusions are clearly stated in insurance policies, the exclusion should be upheld. *See Coleman v. Valley Forge Ins. Co.*, 432 So.2d 1368 (Fla. 2d DCA 1983).

The state's policy regarding the family exclusion clause is clarified in the supreme court's decision in *Brixius,* 589 So.2d 236, and the subsequent legislative response. There, a Class I insured, injured as a passenger in the insured vehicle driven by an uninsured friend, was not entitled to liability or UM coverage. The family-household exclusion clause excluded liability benefits to her, and UM benefits were denied based upon the policy's provision that an uninsured auto is not a vehicle defined as an insured auto under the liability portion of the policy. In response, the legislature added section 627.727(3)(c), Florida Statutes (1992 Supp.), to rectify the situation and provide UM coverage under that scenario. But the legislature declined to respond to the excluded liability coverage based upon the family exclusion clause. The legislature has, in effect, announced that the public policy of this state supports the exclusion of liability insurance coverage based upon a family exclusion clause.

In light of this expression of the state's public policy supporting the family exclusion clause, we do not interpret the Waite decision's abrogation of the interspousal immunity doctrine as an expression that the family exclusion clause is void as against public policy. We decline to equate the broader empowerment given family members to bring a cause of action against another family member with any availability of insurance coverage.

We need not address the issue concerning the protection afforded the insurance company from any impermissible impairment of contract because of policy language which protects them from adverse judicial decision.

CONCLUSION.

Until the legislature addresses the family exclusion clause, the public policy of this state continues to support the parties' freedom to contract. Whether to compel coverage is a matter for the legislature to address.

We, therefore, reverse the summary final judgment in favor of the insureds and direct the trial court to enter summary final judgment in favor of the insurance companies.

Reversed and remanded for further proceedings consistent with this opinion.

ALTENBERND and WHATLEY, JJ., concur.

Note

The *Auto Owners Ins. Co*. case aptly demonstrates the courts' respect of and adherence to prior case precedent and legislative pronouncements demonstrating important public policy. Is not the potential-for-fraud angle obvious? Would family members be inclined to clarify all facts where the ultimate, immediate-term payer of the damages is a third-party insurance company?

CMM Approach: If you ever wondered about the kinds of Florida-specific laws that are tested on the essay portion of the Florida Bar Exam, to show knowledge of Florida's public policies on important issues such as accident insurance, tort law, and contract law (exclusions), the *Auto Owners Ins. Co. v. Van Gessel* case might prove helpful as an example. Florida's approach differs from that of a significant number of other states, which makes it an admirable subject for testing. Also worthy of note is that some of the cases cited in *Van Gessel* were decided *en banc*, which indicates a heightened importance explained *supra* in Chapter 8. You may also note in the string citations within *Van Gessel* a number of indications that review of an opinion was denied. The frequency of appeal, which was denied in three cases cited in the preceding opinion, also bespeaks the heightened importance that an issue takes in the law.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 10

33. The "elements" for damages to validly be awarded
34. Uncertainty of damage as compared to uncertainty of valuating damage
35. The requirements for liquidated damages provisions
36. Nominal damages
37. Exclusion of damages

SUGGESTED EXERCISE(S)

18. Select a small or medium-sized business (for example, a small chain of oil change businesses operating in three states across the Florida/Georgia/Alabama border). What are the kinds of legal issues that should be known and/or addressed as part of a due diligence process for the purchase of those businesses?

Chapter 11: U.C.C. REMEDIES

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Remedies for breaches involving sales of goods, governed by state adoptions of U.C.C. Article 2 (in Florida, FLA. STAT. § 672.101 (2017) *et seq*.), derive from their common-law counterparts and so their similarity should not be unexpected. There are, however, certain differences, or at least certain areas that take on heightened emphasis or use different terminology. For example, FLA. STAT. §§ 672.710 and 672.715 (2017) indicate the right of sellers, and of buyers, respectively, to *incidental* damages, which are defined as commercially reasonable expenses occasioned by the other party's breach. A

valid example would be post-breach shipping costs, such as where a rejecting buyer incurs extra costs to ship the rejected goods back to the seller. Storage costs occasioned by the other party's breach would also fall into this category. Though the common law does not seem to use the same terminology, these types of damages would clearly fit as a form of post-breach "reliance" damage. In the sale-of-goods case, it is clear that the category applies to post-breach damages, begging the question how to categorize U.C.C. Article 2-styled pre-breach "reliance" damages. *See, supra, Florida Recycling Services, Inc.*

Additionally, FLA. STAT. § 672.715 (2017) entitles buyers to *consequential* damages for sellers' breaches, such as for lost profits on a third-party contract or for the cost to buyer on breach of warranty for injury to persons or property.[242526272829] We see no reason why a party to a common-law services or employment contract *could not* use the same terminology to describe damages for which a remedy is sought, but *incidental* and *consequential* should be aligned with post-breach rather than pre-breach expenditures – or the term

[24]

[25] One could also think of the four formation requirements as elements and their respective requirements as sub-elements of formation.

[26] It can sometimes be difficult to determine whether an offer is complete enough to be accepted or only a preliminary discussion intended perhaps to encourage negotiations between parties. At some point, one side's expectations are sufficient to constitute an offer, which the other part(ies) may then accept, reject, inquire into, or return with a counter-offer. There are certain factual situations for this third component that generally require a clear picture; otherwise no offer is formed for lack of, or fatal indefiniteness of, necessary terms. Examples include the need for a durational term and the nature of the work in the case of a contract for services, the requirement of a legal description for contracts concerning the conveyance of interests in real property, and in Uniform Commercial Code (U.C.C.) Article 2 sale of goods cases, the need for a quantity term. The actual language makes a sale of goods contract only enforceable up to the quantity stated – and if the term is blank (i.e., no quantity), the amount is zero. Readers are cautioned to know the distinction between the lack of a necessary component of offer on the one hand, and the lack of sufficient specificity of essential terms on the other. An example of the latter may prove helpful. A rancher may offer to sell from one to three of her award-winning cows. The intent and communicated components are clear to the offeree, but the "what" (here, how many and/or which one) is indefinite. On the other hand, a rancher could offer to sell exactly three of her award-winning cows for $25,000, but in her *mind* it is her prize bulls, whereas in the *mind* of the offeree it is three of the award-winning milking cows. There was an offer. There was an acceptance. Each side would be backed by consideration (three award-winning cows for $25,000). What is missing here is the required coalescence of each party's intent – bulls –versus- milking cows. The distinction can be fairly subtle.

CMM Approach: Determine if the offer is complete or not. If it is, then the first element is met; however, readers may still need to assess whether the fourth element, the "mutuality" or "meeting of the minds addressed later in this chapter, is established.

[27] *See, e.g.*, U.C.C. § 2-101 (2014).

[28] FLA. STAT. ANN. § 671.101 et seq. (West 2017).

[29] *Id.* at .103 (adopting U.C.C. §1-103(b)).

incidental damages for common law contracts (which, your authors recommend, you distinguish between pre- and post-breach forms of reliance). Attention to proper terminology helps to adhere distinctions and are likely to impress upon exam graders a sense that the writer is fully competent in this area of law. The first is an early, preservation-the-status-quo mechanism. The latter are forms of damages (or "remedy," for the last one).

CMM Approach: There are two levels that must be clear when considering breach situations involving the sale of goods. There is the nature of what may be recovered, which is the subject of this Chapter. This needs to be distinguished from what a non-breaching party may do with a non-conforming performance. Regarding the latter, it is possible to suspend performance, or to reject a non-conforming performance, to revoke the acceptance of a substantially flawed performance, or to request specific performance (addressed in Chapter XII), among other things.

Usually, the best action for a non-breaching buyer to take follows a somewhat alphabetically appropriate path. Whereas "j" comes before "v" comes before "w" alphabetically, non-breaching buyers will often prefer to *reject* a tender of performance (FLA. STAT. § 672.601 (2017)), and failing that, *revoke* acceptance of a substantially flawed tender (FLA. STAT. § 672.508 (2017)), and least ideally, to seek damages for breach of *warranty* (FLA. STAT. §§ 672.314 and 672.315 (2017)).[30] Can you see where the payment is located in these options (taking into account installment payments if applicable)?

When determining remedies upon a breach under the Uniform Commercial Code, there is one overarching principle (which you have been introduce to in a slightly different application under Common Law in Chapter X), which is the intent to place the parties in *the position they would have been* but for the breach. The U.C.C. has codified this principle in its guiding remedial provision, § 1-305(a) (*compare* FLA. STAT. §§ 671.106(1) (2017)):

§ 1-305. Remedies to be Liberally Administered.

> (a) The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law.

30

1. Seller's Remedies

A. Introduction: U.C.C. § 2-703

U.C.C. § 2-703 is a good starting point in determining the appropriate actions as well as remedies for sellers in the case of a buyer's breach in the U.C.C. Article 2 (and the state's adoption of same). FLA. STAT. § 672.703, which tracks exactly the language of its U.C.C. Article 2 parent, outlines the available options for a seller upon a buyer's breach. Take a moment to become familiar with the following statute:

FLA. STAT. § 672.703. Seller's remedies in general.

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (§ 672.612), then also with respect to the whole undelivered balance, the aggrieved seller may:
>
> (1) Withhold delivery of such goods;
> (2) Stop delivery by any bailee as hereafter provided (§ 672.705);
> (3) Proceed under the next section respecting goods still unidentified to the contract;
> (4) Resell and recover damages as hereafter provided (§ 672.706);
> (5) Recover damages for nonacceptance (§ 672.708) or in a proper case the price (§ 672.709);
> (6) Cancel.

Note that subsections (1), (2) and (6) are protective activities only, and not pronouncements on the type of actual remedies available, i.e., they are protective actions, not right to payment. The typical forms of recovery are three-fold for a frustrated buyer: (1) resell the goods and recover the price differential if lower on resale, together with extra costs and expenses less expenses saved; and (2) if there is no re-sale, collect the lost profit on a sale, whether for a one-off transaction or for the loss by what is known as a *volume seller* or *lost volume seller*. (There is the possibility of requesting the contract price as damages, but this is specific performance - an equitable remedy that is addressed in Chapter XII)

B. Resale, No Resale, and Lost Profits

(1). Resale: U.C.C. § 2-706

There is a dearth of Florida case law on the right to resell, and then to recover the price differential together with incidental damages less any expenses saved. Thus, there are no readily available cases to demonstrate the mechanics of damages calculation.[31] This is not to say that parties do not utilize this remedies statute often. In fact, it is so simple and logical that it is probably something that rarely leads to an appeal. There are, however, cases concerning the right to repossess and resell after title has passed. A lowered resale price often falls below the original contract price, paving the way to a right to a *deficiency judgment*, which is in essence the same thing as the contract price/sales price differential. With a little imagination, the excerpt soon to follow represents the price differential. A more representative example showing the mechanics is provided in Problem 11-1 that follows.

Because the seller *elected* to retake possession for breach of a conditional sales agreement, it was precluded from pursuing a pre-transfer resale contemplated by U.C.C. §2-706(1).

FLA. STAT. § 672.706 Seller's resale including contract for resale.

(1) Under the conditions stated in s. 672.703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this chapter (s. 672.710), but less expenses saved in consequence of the buyer's breach. (*Resale*)

BILL SMITH, INC. v. COX

District Court of Appeal of Florida, Second District, 1964

166 So. 2d 497

ALLEN, Judge.

Appellant, plaintiff in an action to recover a sum allegedly due under a conditional sales contract, appeals a judgment dismissing its amended complaint, with prejudice.

Appellant sold appellees certain chattels for a stated consideration. Following a 'down payment's the parties executed a 'conditional sales contract'

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providing for payment of the deferred balance in twenty-four installments. This contract of conditional installments. This contract contained

* * *

This is a contract of conditional sale, and not a mortgage, and title is expressly agreed to remain in the Dealer, or his assign, until all sums shall first have been paid in full and in cash. * * *

* * *

If the Buyer shall * * * fail to make any payment when due * * * all sums then unpaid shall be due and payable without notice, and the Dealer or his assigns may at once retake possession of the property, wherever the same may be, and without process of law, and all payments theretofore made shall be retained by the Dealer or his assigns as agreed damages, compensation for the execution of the agreement, and use and hire of the property, and all rights of the Buyer shall be extinguished. Dealer or assigns may take possession of any other property in or connected with this property above described at the time of repossession wherever such other property may be therein and hold the same temporarily for buyer without liability on the part of said Dealer. If the Dealer or his assigns shall retake possession of the property, the Dealer or his assigns may at once resell the same without notice, at public or private sale. Dealer, or assigns shall have the right to bid at such sale, and if proceeds shall be insufficient to pay all sums due, including costs, fees and expenses, the Buyer shall pay such deficiency; if the proceeds shall exceed the same, such excess shall belong to the Buyer. Dealer or his assigns may collect from Buyer the balance unpaid plus costs, fees and expenses, without repossession.' (Emphasis added.)

Appellees, after making three payments, defaulted and returned the chattels to appellant for resale. Appellant resold them, realizing an amount which, after deduction of the expenses of resale, was less than the balance due from appellees under the contract. Suit for this deficiency ensued.

The lower court, apparently of the belief that appellant's retaking the chattels constituted an election of remedies preclusive of an action for the balance of the purchase price, dismissed the cause and this appeal ensued posing as the determinative question whether the emphasized portion of the aforequoted provisions in the contract is valid and enforceable.

In support of its argument that the lower court erred in refusing to permit the alternative means of recovery contemplated by the contract, appellant argues that the cases relied upon by appellees, hereinafter cited, contain only dicta which cannot control, that the great weight of authority in other jurisdictions indicates acceptance of contractual provisions similar to the one upon which

it relies and that the practice contemplated in these provisions is neither contrary to statute nor to public policy in Florida. Fla.Stat. 520.11, F.S.A. (1963) is cited as indicative of a favorable 'public policy.'

With respect to the statutory provision cited, we cannot and will not attribute to the legislature an intent beyond that expressed and accordingly find the statute entirely inapplicable. A study of the decisions in other jurisdictions is illuminating but unpersuasive. See Annots. 49 A.L.R..2d 15, 66–74 (1956); 99 A.L.R.. 1288, 1290 et seq. (1935) and 43 A.L.R.. 1243 (1926). The decisions on point in these 'modern' authorities are in many instances distinguishable and in other instances based upon considerations specifically rejected by out Supreme Court in *Voges Motor Co. v. Ward*, 1929, 98 Fla. 304, 123 So. 785.

The leading Florida case, *Voges Motor Co. v. Ward*, *supra,* involved a contract provision in effect identical to the one subjudice. Construing this provision, the Court wrote:

> 'In so far as the contract retains the title until the debt as evidenced by the notes is paid, this clause is valid; but under our decisions, in so far as this clause would permit a personal action against the purchaser for the recovery of the debt, without waiving the right to pursue the property, it must be held ineffective and unenforceable, if the contract is to be upheld as a conditional sale contract.
>
> * * *
>
> Our decisions are clear to the effect that in a conditional sale, the seller cannot sue the purchaser on the debt and retain his title to, and right to take back the possession of, the property; nor can he take back the property and then sue to recover the debt; nor has he power to grant to another any right to pursue these inconsistent remedies.
>
> * * *
>
> 'But the alternative provision in the repossession clause, to the effect that the holder of the notes and contract may, in addition to retaking possession, sell the property, apply the proceeds on the debt, and then hold the purchaser liable for any deficiency, is, as to the last provision, incompatible with the true theory of a conditional sale, as contrued by this court in the cases above referred to. He may, on default, repossess the property, and, if he so desires, sell it; but he cannot take the property and also pursue the purchaser for the debt. When the elects to retake the property as owner, this necessarily precludes any recovery of the balance

due on the debt. * * *’

The foregoing, though perhaps obiter dicta if viewed in the context of the somewhat unusual facts in the *Voges* case, was nonetheless an unmistakable enunciation of the law and has become so accepted as such as to be afforded controlling effect. *See e. g. Baer v. General Motors Acceptance Corp.*, 1931, 101 Fla. 913, 132 So. 817. Notwithstanding appellant's arguments, we decline to recede from the pronouncements of the Court in the *Voges* case and, accordingly affirm the judgment of the lower court.

Affirmed.

SMITH, C. J., and CABOT, TED, Associate Judge, concur.

Note

The distinction between regular sales contracts and conditional ones relies on a unique (and testable) point. If title to the goods passes to the buyer in the former, it would not in the case of the latter. They are mutually exclusive. If a seller keeps title and takes something away from a buyer, is this not the remedy, or at least a significant part of one?

Problem 11-1

Scott entered into a written contract with Betty to sell her his car for $15,000 with a delivery date of January 1. On January 1, Scott brings the car over to Betty’s house but Betty refuses to accept the car. That day, Scott posts a free listing online to sell his car and a buyer quickly offers him $15,000 for the car. Scott makes the delivery on the same day. If Scott sues Betty for breaching the contract, what damages may Scott recover against Betty? What if Scott had sold the car for $10,000? What if Scott had to pay $100 for the ad?

(2). No Resale & the Lost Volume Seller: U.C.C. §§ 2-708(1) & (2)

There are two aspects to consider here. Subsection (1) covers the one-off sale that fails. An example would be where a buyer who agreed to pay $500 for a used guitar refuses, where the market price is only $300. The lost value of that sale, or $200, would be recoverable. Subsection (2) is the lost sale to a *volume seller*. A non-accepted good may be resold, but the profit on that single sale is lost to a bulk seller, also known as *volume sellers* or *lost profit sellers*. The case that follows provides an overview on who constitutes a lost volume seller and what remedies are available. *See also Teradyne, Inc. v. Teledyne Industries, Inc.*, 676 F.2d 865 (1982), for an in-depth explanation of

lost volume sellers.

FLA. STAT. § 672.708 Seller's damages for nonacceptance or repudiation

(1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (s. 672.723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (s. 672.710), but less expenses saved in consequence of the buyer's breach. (*No resale, benefit of bargain; and no consequentials*)

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (s. 672.710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale. (*Lost profit for high-volume sellers who could and do re-sell, but would lose the profit when one buyer walks away; also no consequentials*)."

FLORIDA RECYCLING SERVICES, INC. v. PETERSEN INDUSTRIES, INC.

District Court of Appeal of Florida, Second District, 2003

858 So. 2d 1114

NORTHCUTT, Judge.

The circuit court found Florida Recycling Services liable to Petersen Industries for breach of contract and entered a final judgment for damages in Petersen's favor. On appeal, Florida Recycling challenges the finding of liability. We find no error in that decision and affirm it without further discussion. On cross-appeal, Petersen contends that its award was inadequate

because it did not include certain incidental damages. We agree and reverse.

Florida Recycling contracted with Petersen to purchase a “Lightning Loader,” a truck-borne device used to pick up and transport large items. The contract price was $35,000, which included the cost of manufacturing the loader, the costs of modifying the loader and Florida Recycling’s truck so that they would work together, and Petersen’s profit. Petersen installed the loader on Florida Recycling’s truck, but Florida Recycling refused to take delivery. Sometime after Florida Recycling breached the contract, Petersen removed the loader from Florida Recycling’s truck and sold it to another purchaser.

Petersen sought damages for $7873.65 in lost profits pursuant to the Uniform Commercial Code, section 672.708(2), Florida Statutes (1999). Also, as provided in section 672.710, Petersen claimed $10,180.35 in incidental damages for the costs of modifying the loader and Florida Recycling’s truck. The balance of the purchase price was the cost of manufacturing the loader, which Petersen did not seek because it was compensated for that expense in the resale. The circuit court awarded Petersen its lost profits, (footnote omitted) plus interest and litigation costs, but it refused to award the modification costs because they were “included in the purchase price and, presumably; the costs of remodifying the loader for resale was included in that purchase price.” Petersen established at the trial that it incurs modification costs with every sale. When Petersen resold the loader, it had to modify the loader a second time and it had to modify the new purchaser’s truck. The new purchaser compensated Petersen for those modifications, but it did not reimburse Petersen for the modifications it performed pursuant to its earlier contract with Florida Recycling.

A seller is entitled to the full measure of its damages from a breaching buyer. *Vagabond Container, Inc. v. City of Miami Beach,* 356 So.2d 1266, 1267 (Fla. 3d DCA 1978). This includes lost profits under section 672.708(2) and incidental damages under section 672.710. Section 672.710 defines incidental damages as including “any commercially reasonable charges, expenses or commissions ... resulting from the breach.” The comment to section 672.710 states that its purpose is “[t]o authorize reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer’s breach.” No one disputes that Petersen reasonably incurred the modification expenses. If Florida Recycling had completed the purchase, Petersen would have been reimbursed these costs through payment of the purchase price. Instead, Florida Recycling’s breach left Petersen with a loader that had been modified specifically for Florida Recycling’s purposes and that had to be modified again before it was resold. In order to recover the full measure of its damages, Petersen must be awarded these incidental expenses.

We reverse the damages portion of the judgment and remand with instructions to award Petersen both its lost profits of $7873.65 and its

incidental damages of $10,180.35, plus interest and litigation costs.

Appeal affirmed; cross-appeal reversed and remanded.

SALCINES and STRINGER, JJ., concur.

The following problem partly explores damages already explained but it also premises other facets of possible remedy to be described in the subsection that follows it.

Problem 11-2

Sandy, a designer chicken breeder, entered into a written contract with Brody to sell him ten of her finest chickens at a price of $100 each, which is the current market price of the chickens. Sandy spent $200 to transport the chickens to Brody's farm. Before Sandy begins unloading the chickens, Brody says, "I won't be buying the chickens anymore. I decided I want to buy pigs instead. I won't be paying you the $1,000 for the chickens." Sandy had to spend another $200 to transport the chickens back to her farm. To try and make up some of her losses, Sandy agreed to sell the ten chickens to another buyer for $75 each. What damages can Sandy recover from Scott for breaching their contract? How does this problem differ from Problem 11-1?

C. Incidental Damages as a Component of Expectation Damages

The *Florida Recycling Services, Inc.* case amply demonstrates the ability of non-breaching sellers to recover lost profit on sale in the case of "volume" sellers. The court in that case also awarded because-of-breach *incidental* damages. Can you see why? The case that follows includes a unique argument to get around the general rule that sellers are not entitled to consequential damages – which ultimately fails, thereby preserving the general rule. To not only understand, but also to help in remembering this distinction, can you think of a good reason why non-breaching sellers, in contrast to non-breaching buyers, should not be entitled to consequential damages? For a very interesting article on the comparison of U.C.C. Article 2 incidental damages to common law reliance damages, *see* Michael T. Gibson, *Reliance Damages in the Law of Sales Under Article 2 of the Uniform Commercial Code*, 29 ARIZ. ST. 50.J. 909 (1997).

FLORIDA MINING & MATERIALS CORP. v. STANDARD GYPSUM CORP.

District Court of Appeal of Florida, Second District, 1989

550 So. 2d 47

CAMPBELL, Chief Judge.

Appellant, Florida Mining & Materials Corporation, appeals a final judgment awarding appellee, Standard Gypsum Corporation, damages in the amount of $3,120,566. The award of damages to appellee was a consequence of the jury's special verdict findings that appellant had breached its contract with appellee. The contract between the parties called for appellee to sell to appellant all of appellant's gypsum requirements. Appellee filed its action below alleging that appellant breached the contract by purchasing gypsum from third parties.

Appellant defended and counterclaimed against appellee seeking rescission and damages on the grounds of fraud, breach of contract on the part of appellee, breach of warranty and on other theories. The jury in its special verdicts found for appellee and against appellant in regard to the breach of contract claims. We find no reversible error in regard to those findings. We do, however, find error in regard to the measure of damages the jury was permitted to consider. Appellant argues and we agree that it was error to permit the jury to consider and award appellee as seller under the contract consequential damages for loss of its business that appellee asserts flowed from appellant's breach of the contract of sale. We reverse the award of damages to appellee and remand for a new trial on that issue alone.

The Uniform Commercial Code (U.C.C.) governs the sale of goods in Florida. Ch. 672, Fla.Stat. (1987). While an aggrieved *buyer* may recover consequential damages for a seller's breach of contract (sections 672.713–672.715), an aggrieved *seller* is limited to recovering lost profits and incidental damages as its remedy for a breach of contract. § 672.708, Fla.Stat. (1987); *Vagabond Container, Inc. v. City of Miami Beach,* 356 So.2d 1266 (Fla. 3d DCA), *cert. denied,* 364 So.2d 882 (Fla.1978).

Appellee argues that the U.C.C. as codified in Florida in chapter 672 does not preclude the parties to a contract of sale from expressly agreeing to damages exceeding or differing from those expressed or prohibited in the U.C.C. Appellee relies upon paragraph 8 of an addendum to the parties' contract to provide that exception to the limitation on the seller's right to recover consequential damages as expressed in the U.C.C.

That paragraph provides as follows:

> a. [I]t is necessary for the Seller to incur costly inventory expenses well in advance of delivery to and payment by Buyer for the Gypsum. *A default by the Buyer will cause the Seller to suffer substantial and irreversible financial damages*....
>
> b. In the event of Buyer's default hereunder, the rights of Seller hereunder may be enforceable in a court of equity by a decree of specific performance or injunctive relief as the case may be. Such remedy shall, however, be cumulative and not exclusive, and shall be *in addition to any other remedy Seller may have including an award of appropriate damages* in the event the actions of Buyer so warrant. (Emphasis supplied.)

We cannot agree with appellee and the trial judge that the *emphasized language* of paragraph 8 provides a clear and express right to consequential damages for the loss of appellee's business sufficient to overcome the limitations of the U.C.C. prohibiting the recovery of such consequential damages by a seller.

* * *

We also reverse the judgment awarding attorney's fees, costs and prejudgment interest. It is more proper that all of those matters be addressed after retrial.

The other issues raised by appellant in this appeal are either without merit or are made moot by our disposition of this appeal.

Reversed and remanded for new trial on damages.

2. Buyer's Remedies

A. Introduction: U.C.C. § 2-711

As was the case for a non-breaching seller's available remedies, the first step in determining the available remedies that a buyer may have is to investigate whether the buyer has or has not accepted the goods. There are certain protective actions that non-breaching buyers may take, as well as components of damages claims. Hopefully addressed in an upper level Commercial Transactions course, one of those actions is to cause inventoried goods to be identified to a particular contract. Note also the creation of a security interest

in rejected (or acceptance-revoked) goods by operation of law. The basic rights for non-breaching buyers are:

FLA. STAT. § 672.711. Buyer's remedies in general; buyer's security interest in rejected goods

17. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 672.612), the buyer may cancel and whether or not he or she has done so may in addition to recovering so much of the price as has been paid:

> (a) "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
> (b) Recover damages for nondelivery as provided in this chapter (§ 672.713).

18. Where the seller fails to deliver or repudiates the buyer may also:

> (a) If the goods have been identified recover them as provided in this chapter (§ 672.502); or
> (b) In a proper case obtain specific performance or replevy the goods as provided in this chapter (§ 672.716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his or her possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (§ 672.706).

As you may have discovered when reading FLA. STAT. § 672.711, there are three remedial options for an injured buyer to take: (1) to recover any extra cost of *cover* under FLA. STAT. § 672.712 (FLA. STAT. § 672.711(1)(a) (2017)); (2) to recover *market damages* under FLA. STAT. § 672.713 (FLA. STAT. § 672.711(1)(2) (2017)); and (3) to collect the differential between goods as promised from goods as delivered (*warranty damages*).

Again, the first line of inquiry to pursue for determining a non-breaching buyer's remedial measures is to see whether there has been as acceptance of goods. (*See* FLA. STAT. § 672.606 (2017)). If there has been an acceptance, the correct statutes to utilize would be FLA. STAT. §§ 672.607(3)-(4) and 672.714 (2017). It is important to recognize that there are notice and burden of proof

requirements (which amongst other things ensures respect a seller's *right to cure a non-conforming tender*). This is addressed in the first case that follows. For purposes of this Chapter, it is not problematic that the case deals with a breach of warranty claim rather than a rejection of non-conforming goods or a revocation of their acceptance. The second case illustrates what happens when a non-breaching buyer properly adheres to the requirements outlined in applicable statutes.

As an initial matter to qualify for the right to damages, there is a requirement of *notice to the seller* for at least three reasons. First, if time for tender of delivery is not yet reached, the seller should have the opportunity to cure the defect and thereby avoid a breach. For the right of the seller to cure pre-breach, *see* FLA. STAT. § 672.508(1) (2017). Second, under FLA. STAT. § 672.515 (2017), either party has the right to inspect the goods if their conformity to the terms of the agreement are in question (e.g., for buyer to be able to reject for non-conformity, or for seller to be able to verify non-conformity in case the buyer may be lying). This is an attempt to preserve the evidence so as to protect destruction of evidence and to promote the ascertainment of facts necessary to determine whether a breach has occurred. Lastly, there is an overall bar for recovery in U.C.C. Article 2 (and in Florida's adoption of it) if a seller does not give proper notice to the buyer. For a post-breach duty on the buyer to notify, *see* FLA. STAT. §§ 672.602(1) (buyer's seasonable notice of rejection) and 672.607(3) (2017) (buyer's duty to notify if not rejecting). The following case exemplifies Florida's recognition of the notice-of-breach requirement of FLA. STAT. § 672.607(3) (2017).

HAPAG–LLOYD, A.G. v. MARINE INDEMNITY INSURANCE CO. OF AMERICA

District Court of Appeal of Florida, Third District, 1991

576 So. 2d 1330

SCHWARTZ, Chief Judge.

After a jury trial, the appellee-purchaser won a judgment for breach of an express warranty of soundness in the sale of a piece of stevedoring equipment by the appellant. We reverse with directions to enter judgment for the appellant.

The undisputed testimony [footnote omitted] established that a responsible official of the buyer was aware of the defective wiring in the engine of the "toploader" in question, which constituted the alleged breach of warranty sued upon, but nevertheless determined, without notifying the seller, to continue to use the equipment in its defective state until the defect could be repaired. In fact, the appellee did operate the toploader for at least four

weeks, without repair or notice, until the wiring caused an explosion in the engine which severely damaged the equipment. The purchaser gave notice of the claim that the express warranty had been breached only after the accident and damages had occurred.

In these circumstances, we find as a matter of law that the buyer did not give the notice to the seller of the alleged breach "within a reasonable time after [it] discover[ed] or should have discovered any breach," as is required to permit a recovery for breach of warranty under section 672.607(3)(a), Florida Statutes (1979).(Footnote omitted) *General Matters, Inc. v. Paramount Canning Co.,* 382 So.2d 1262 (Fla. 2d DCA 1980). It is obvious that the failure to afford the seller reasonable notice of an already-discovered defect until after the loss caused by the breach of warranty had already occurred—when, as clearly appears, the seller could have remedied the defect and prevented the loss—requires a conclusion that, as the statute provides, the buyer is "barred from any remedy." See *Royal Typewriter Co. v. Xerographic Supplies Corp.,* 719 F.2d 1092 (11th Cir.1983); *Running Springs Assocs. v. Masonite Corp.,* 680 F.2d 469 (6th Cir.1982); *K & M Joint Venture v. Smith Int'l, Inc.,* 669 F.2d 1106 (6th Cir.1982); *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.,* 532 F.2d 957 (5th Cir.1976).

Reversed.

B. Cover, Lost Value, and Warranty Damages

The U.C.C. Article 2 and the states' adoption of same provide for what is known as the *perfect tender rule*. *See* FLA. STAT. § 672.601 (2017). This permits the buyer to do three things where the tendered goods *are not in conformity with the terms of the agreement*. This is a unique standard for rejection that differs from other standards such as for the right to *revoke acceptance*, which is a "substantial impairment to (the buyer)" standard, which is higher than that for rejection. The revocation standard also switches the burden of proof from seller who would have to prove actual conformity onto buyer, who would then have to prove the substantial impairment. FLA. STAT. § 672.608(1) (2017). (You may want to revisit the CMM Approach from earlier in this Chapter).

In the case of a non-conformity, buyers have three primary choices: (1) reject the good(s); (2) reject part of the tender but keep any commercially reasonable units; or (3) accept the goods (or any commercially reasonable units thereof) and collect damages for breach of warranty (goods as warranted less as received). FLA. STAT. §§ 672.601(a)-(c) (2017). Rejection leads to *cover* or to collection of the lost benefit of the bargain. Acceptance still allows for damages, though.

(1). Cover (Rejection): U.C.C. § 2-712

A buyer seeking remedies for a breach of contract regarding unaccepted goods has a few statutes to consider. Under FLA. STAT. § 672.711 (2017), a buyer may be able to recover the price as well as other damages, primarily incidental and consequential damages under FLA. STAT. § 672.715 (2017). As will be discussed later in this Section, a buyer may also seek what is known as replevin under FLA. STAT. § 672.716 (2017), which is a form of specific performance.

There is another important concept to recognize when considering buyer's remedies for breach regarding unaccepted goods, and that is the concept of *cover*. This concept is discussed in FLA. STAT. § 672.712 (2017). Pursuant to this statute, a buyer has the ability to cover their losses by making a good-faith purchase of substitute goods without an unreasonable delay. Additionally, if a buyer chooses to cover, that buyer has the ability to recover damages as calculated in FLA. STAT. § 672.712(2) (2017): the difference between the cover and contract price, together with any incidental or consequential damages less any expenses saved.

Problem 11-3

Bobby agrees to purchase a used law school book online from an upperclassman, Stephen, for $200, payable upon delivery. Stephen agreed to have to arrive at Bobby's house within seven days. Right before shipping out the book, Stephen decides that he wants to keep the book to use it while studying for the Bar exam, so he calls Bobby and informs him of his intention to call off the sale. Bobby, who knew another upperclassman who was selling the same book, called his classmate and purchased an identical book from them for $200. What damages may Bobby be able to recover against Stephen? Would your answer change if Bobby had paid Stephen for the book prior to shipping and receipt?

(2). Non-Cover (Rejection/Revocation): U.C.C. § 2-713

The guiding statute for non-cover, unaccepted goods is FLA. STAT. § 672.713 (2017), which gives a measurement of damages for a seller's breach involving unaccepted goods that have not been replaced by another source by the buyer. Under this statute, a buyer can recover the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and *consequential* damages, less expenses saved.

Problem 11-4

Beth contracted with Sally's Salon Equipment to purchase fifteen hair dryers to use in her new spa location at a price of $50 each. When Beth received the shipment from Sally's, she realized that they had mistakenly shipped her fifteen hair straighteners (which were sold from Sally's for $30 each) instead of hair dryers. Beth decided that she would simply keep the hair straighteners, even though this meant she needed to purchase more hair dryers, so she decided it was no-harm, no-foul. Four months later, Beth's business was declining, so she decided that she would bring suit against Sally's for breach of contract for shipping the hair straighteners instead of the hair dryers. Will Beth be successful in recovering damages? Is Beth had already paid for them? In what amount? Would your answer change if she had brought this suit a week after receiving the wrong goods? What about if she immediately called Sally's and informed them of the receipt of the wrong goods?

Notes

38. Technically, a buyer is not *required* to cover under FLA. STAT. §§ 672.712 and 672.713 (2017). However, under FLA. STAT. § 672.715(2)(a) (2017), a buyer may be barred from or limited in the recovery of certain consequential damages that *reasonably could have been avoided* (hence the "less expenses saved in consequence of the seller's breach" language). In other words, if the buyer reasonably could have mitigated its consequential damages by covering, they will be precluded from recovering the amount of damages that could have been prevented by such a cover. This is often denoted as the duty to mitigate (or to avoid) damages – but it is more of a disqualifying provision than a "duty." Perhaps a rephrasing would make things more clear: the right to consequential damages rests upon a concomitant duty to act reasonably in their avoidance.

39. There may be instances where a buyer breaches a contract with the seller and the buyer may be able to recover damages for restitution, such as money that has already been paid to the seller. Such an instance is codified in FLA. STAT. §§ 672.718(2)-(3) (2017).

(3). Acceptance, but with Damages for Breach of Warranty

ADAM METAL SUPPLY, INC. v. ELECTRODEX, INC.

District Court of Appeal of Florida, Second District, 1980

PER CURIAM.

This appeal involves the application of several sections of the Uniform Commercial Code. Appellee contracted to buy from appellant 200 sheets of Coilzak, a special kind of aluminum sheeting, for a total sales price of $3,069. Appellee intended to use the Coilzak in the manufacture of lighting fixtures which were to be sold to a third party (WILD) pursuant to a contract requiring the use of Coilzak aluminum in the fixtures. In the course of processing the shipment, appellee concluded that the shipment it had received was not Coilzak and refused to pay for it.

Appellant sued for the purchase price. The court denied appellant any relief because it found that the shipment was nonconforming and thereby entitled appellee to a set-off of $3,069. Appellant does not contest the finding that the aluminum shipment was not Coilzak but argues that appellee accepted the shipment and therefore was liable to pay for it.

It does appear that appellee accepted the shipment and that thus under Section 672.607(1), Florida Statutes (1979), it was liable for the contract price. However, it notified appellant of the nonconforming use within a reasonable time after discovery according to the requirements of Section 672.607(3)(a), Florida Statutes (1979). Consequently, under Section 672.714, Florida Statutes (1979), it was entitled to damages for the nonconforming shipment which it could subtract from the contract price of the shipment pursuant to Section 672.717, Florida Statutes (1979). Insofar as this analysis goes, we are in agreement with the trial court, but we must quarrel with its finding that appellee's damages equaled the contract price.

In failing to provide appellee with Coilzak, appellant breached an express warranty to appellee that the goods appellee was to receive would be Coilzak. s 672.313, Fla.Stat. (1979). That part of Section 672.714 which deals with damages for breach of warranty is subsection (2), and it reads as follows:

> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

Appellee was able to use 40% of the shipment in the manufacture of smaller fixtures which did not require Coilzak aluminum, and appellee was able to sell these fixtures to WILD. Appellee did not demonstrate that the value of the forty per cent of the shipment which it used was less than the contract price.

Therefore, appellee failed to prove damages for breach of warranty as to forty per cent of the shipment.

WILD declined to take any more fixtures without Coilzak aluminum, so the balance of the shipment had only scrap value to appellee. Since the court gave appellant the right to retrieve the unused aluminum, appellant could not claim that appellee even had the benefit of scrap value. Therefore, appellee was entitled to damages of sixty per cent of the contract price or $1,841.40. It should be noted that in applying Section 672.714(2), we have used the value of the aluminum after it was sheared rather than the value of the aluminum at the time of its acceptance. However, the "special circumstances" of this case, namely the fact that it was necessary to shear the aluminum in order to determine that it was not Coilzak, mandates that result and makes it perfectly proper under Section 672.714.

Appellee also proved that it incurred an expense of $200 in shearing all of the aluminum sheets before it realized the nonconforming use. The shearing costs applicable to the unusable portion of the shipment were $120 ($200 X 60%). Thus, appellee suffered incidental damages in that amount as permitted by Section 672.714(3).

Appellee's total damages were $1,961.40. Therefore, appellee was only entitled to a set-off of that amount against the contract price of $3,069. Accordingly, we reverse with directions to enter judgment for appellant in the sum of $1,107.60.

REVERSED AND REMANDED WITH DIRECTIONS.

SCHEB, C. J., and GRIMES and DANAHY, JJ., concur.

Notes

31. Once it is determined that a buyer can recover damages under FLA. STAT. § 672.706 (2017), the buyer must look to FLA. STAT. §§ 672.714 and 672.715 (2017) for the proper measurement of damages. Under FLA. STAT. § 672.714 (2017), a buyer who opts to keep the goods may recover the damages for the nonconformity of any accepted goods (but only if the notification requirements of FLA. STAT. § 672.706 (2017) have been met). Subsection (2) of § 672.714 also sets out a helpful method of quantification of damages, and subsection (3) permits a buyer to look to FLA. STAT. § 672.715 (2017) for recovery of incidental and consequential damages in a "proper case."

32. Though the proper subject for further treatment is in an upper level Commercial Transactions course, readers should at least be aware

of the existence of two *implied* warranties – one of merchantability and one of fitness for a particular purpose. FLA. STAT. § 672.314 (2017) implies, unless excluded or modified (discussed in Section C. below), a warranty of merchantability. Though there are six formulations of *merchantability*, the most often addressed is the FLA. STAT. § 672.314(2)(c) (2017) implied warranty that a good is fit for the ordinary purposes for which such goods are used in cases where a buyer is relying on the seller's skill or knowledge, and the seller has reason to know of the reliance. Such advanced course should also address the implied warranty that a seller of goods turns over proper title to a buyer (which could of course be modified if clearly spelled out in a purchase agreement).

C. Consequential Damages as a Component of Expectation Damages (in addition to Incidental Damages)

Under FLA. STAT. § 672.715 (2017), a buyer may recover incidental and consequential damages. *Incidental damages* are those damages that "include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." FLA. STAT. § 672.715(1) (2017). However, a buyer can only recover *consequential damages* for … "(a) [A]ny loss resulting from general or particular requirements and needs of which the *seller at the time of contracting had reason to know* and which could not reasonably be prevented by cover or otherwise; and (b) Injury to person or property *proximately resulting from any breach of warranty*." FLA. STAT. § 672.715(2) (2017) (emphasis added). This means that in order to recover consequential damages, the damages must be both foreseeable and proximately caused by the seller's breach. (This is clearly related to the common law concepts of foreseeability, certainty, and avoidability that apply to the common law qualifications for expectation damages discussed in Chapter X). The following two case excerpts may help to the concept.

HALLIBURTON COMPANY v. EASTERN CEMENT CORP.

District Court of Appeal of Florida, Fourth District, 1996

672 So. 2d 844

FARMER, Judge.

This is the second appearance of this case before us. In its previous

manifestation, we reversed a directed verdict which had ruled as a matter of law that the "no warranty disclaimer" in seller's offer trumped the express warranty provision in buyer's acceptance. *Eastern Cement Corp. v. Halliburton Co.,* 600 So.2d 469 (Fla. 4th DCA), *rev. denied,* 613 So.2d 4 (Fla.1992). We determined that the two varying provisions canceled each other, and that the remaining contract implied statutory warranties of fitness for a particular purpose and merchantability. Having so decided, we added: "under section 672.715, Florida Statutes (1989), the buyer can recover both incidental and consequential damages when these implied warranties are read into the contract." 600 So.2d at 472.

On this second appeal, seller argues that its disclaimer survived our first opinion and that, as a matter of law, its disclaimer of warranties effectively bars buyer's cause of action for breach of warranty damages. We again disagree with seller's argument for the reasons expressed by Judge Downey in the first appeal.

Turning to the subject of remedies for breach of contract, we reject buyer's "for-want-of-a-nail" argument under which the trial court allowed the jury to award damages in this action involving the sale of goods. Essentially the buyer argued that if the goods sold, a single pneumatic cement pumping system, had been as warranted, it would then have purchased four additional systems and, thence, after chartering a vessel for a long term would have exploited the systems by entering the containerized cargo business. The jury accepted this evidence because it awarded damages representing the profits lost from the proposed containerized cargo business with the four additional systems operating as planned. Seller argues that buyer's damages were too remote and speculative to go to the jury.

Ordinarily, where the buyer has accepted non-conforming goods and sued for breach, as in this case, the buyer is entitled to general, incidental and consequential damages, which in a proper case may be an amalgam of some or all three. §§ 672.714 and 672.715, Fla.Stat. (1995); *see also Hadley v. Baxendale,* 9 Exch. 341, 156 Eng.Rep. 145 (1854). Section 672.714(2) states that the measure of general damages is the difference between the value of the goods accepted and their value as warranted. Section 672.714(3) provides that incidental and consequential damages may be recovered "in a proper case."

Consequential damages are defined in the Code to be:

> "[a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of

warranty."

§ 672.715(2), Fla.Stat. (1995). As the leading text on the UCC points out, "[t]he most commonly litigated and thus the most often sought after item of consequential damages is lost profits." White & Summers, 1 UNIFORM COMMERCIAL CODE 3rd, § 10–4, at 518. As this text also points out, to recover lost profits the buyer must generally satisfy the judicial requirements of foreseeability and certainty. *Id.*

The courts previously drew a distinction about lost profits between established businesses and those not yet begun. *See, e.g., New Amsterdam Cas. Co. v. Utility Battery Mfg. Co.,* 122 Fla. 718, 166 So. 856 (1935) (claimant allowed to show lost profits as to established business by competent proof); *Innkeepers Int'l, Inc. v. McCoy Motels Ltd.,* 324 So.2d 676 (Fla. 4th DCA 1975), *cert. denied,* 336 So.2d 106 (Fla.1976) (recovery for lost profits not generally allowed for new business with no history); *A & P Bakery Supply & Equip. Co. v. Hawatmeh,* 388 So.2d 1071 (Fla. 3d DCA 1980) (same); *but see Twyman v. Roell,* 123 Fla. 2, 166 So. 215 (1936) (proof of lost profits for unestablished business allowable provided there is "yardstick" by which such profits may be measured). More recently, however, in *W.W. Gay Mech. Contractor, Inc. v. Wharfside Two Ltd.,* 545 So.2d 1348 (Fla.1989), the court explained and modified its previous holdings:

> "In *New Amsterdam* this Court held that prospective business profits are generally too speculative and dependent on changing circumstances to be recovered. *New Amsterdam* provided an exception allowing the plaintiff to show the amount of his loss by competent proof. However, this exception only applied to the interruption of an established business. *Twyman,* on the other hand, did not limit recovery to established businesses. There, the Court stated that, if there is a 'yardstick' by which prospective profits can be measured, they will be allowed if proven. 123 Fla. at 6, 166 So. at 217. The Court provided further that the 'uncertainty which defeats recovery in such cases' is the cause of the damage rather than the amount. 'If from proximate estimates of witnesses a satisfactory conclusion can be reached, it is sufficient if there is such certainty as satisfies the mind of a prudent and impartial person.' *Id.* at 7–8, 166 So. at 218. *See also Conner v. Atlas Aircraft Corp.,* 310 So.2d 352 (Fla. 3d DCA), *cert. denied,* 322 So.2d 913 (Fla.1975).
>
> "We follow the holding in *Twyman.* A business can recover lost prospective profits regardless of whether it is established or has any 'track record.' The party must prove that 1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined."

545 So.2d at 1350–51. Hence, although we regard buyer's evidence as to the indispensable yardstick in this case to be unusually weak, we find it necessary to concentrate our attention on the evidence relating to the cause of the damage rather than the amount.

The issue of causation begins with a legal inquiry that, if satisfied, ends with a factual inquiry. This is so because the cause for any contemporary event can, if one is inclined to do so, be connected in a seemingly logical chain of circumstances and occurrences all the way back to creation. But the law imposes boundaries on the inquiry. Justice Cardozo once spoke of:

> "that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. [c.o.] Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. * * * To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by."

Gully v. First National Bank in Meridian, 299 U.S. 109, 117–118, 57 S.Ct. 96, 100, 81 50.Ed. 70 (1936). In short, the facts relating to causation must first satisfy legal restraints, i.e. the legal limits to how deeply into history the law will allow the cause for an event to be traced.

Here, the link of unrealized future events necessary to establish the loss is founded on the buyer's testimony that it lost $24+ million because the defect in the one system actually sold prevented the buyer from going into a new business in which 4 other systems would have been necessarily purchased and, with them, the profits would surely have flowed. [Footnote omitted] An expert opinion from an outside economist with a Ph.D. projecting future revenues, profits and economic probabilities for the anticipated success of a prospective new business venture may provide a reasonable measure in a proper case for the loss of prospective profits in a business not yet begun, but it hardly addresses the causal relationship inquiry as to the proximate results of the breach itself.

Buyer's own evidence shows that the connection between the one system and the future business is, as a matter of law, too remote, too speculative, and too theoretical. The lost profits would purportedly have resulted from the operation of 4 additional systems, which the buyer says it *would* have purchased sometime in the future if the one system sold under the contract in suit had performed as warranted. There was not even a proposed contract for

the future purchase of these 4 additional systems, and no discussion between buyer and seller as to possible terms. This future business would have been collateral and secondary to the business for which the single contractual system was purchased. Buyer had no personnel with experience in shipping containerized cargo. No express type of cargo was specified. The suggested scheme was not evidenced by formal plans, by proposed budgets, by specific site plans, by the formation of a new legal entity, or by anything that would have moved from an aspiration to a concrete (pun intended) plan.

All that was offered was a hope of commercial fortune hanging from a thin thread of "what-ifs"—buoyed by the buyer's after-the-fact testimonial conviction that success and profits would surely have been there for the taking. The evidence forming the necessary chain of causation between the defects in the single system sold under the contract in suit and any possible future profits lost in the containerized cargo business comes down to little more than pure speculation. Buyer's evidence as to causation is as reliable as the "investment" at the $2 window.

It is in short, as seller argues, the nail that lost the kingdom. To borrow from *Ohoud Establishment for Trade & Contracts v. Tri–State Contracting & Trading Corporation,* 523 F.Supp. 249 (D.N.J.1981), cited by seller:

> "The court would have little difficulty in submitting the loss of the shoe, the horse, and probably the rider to a jury if caused by the sale of a defective nail or the failure to deliver the nail as agreed. The loss of the battle creates a doubtful question, but the loss of the kingdom is so remote as to bar its submission to a jury."

523 F.Supp. at 255. The court added: "[i]f the manufacturer of the nail becomes responsible for the loss of the kingdom, then we may not have any more nails." 523 F.Supp. at 257.
We also agree as a matter of law that the dreamed-of system does not properly fit into the UCC's provision regarding "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know." The claimed loss clearly would not constitute "incidental" damages under section 672.715(1). Equally, it is not "injury to person or property proximately resulting from [the] breach of warranty" permitted by section 672.715(2)(b), for there is no possible claim here for injury to person or property.

Therefore, we affirm the jury verdict on liability but reverse the damages and remand to the trial judge to strike any award for lost profits for the future containerized cargo business. [Footnote omitted]

GUNTHER, C.J., and POLEN, J., concur.

A & P BAKERY SUPPLY & EQUIP. CO. v. HAWATMEH

District Court of Appeal of Florida, Third District, 1980

388 So. 2d 1071

HENDRY, Judge.

The parties entered into discussions regarding the sale to appellee of a damaged commercial oven owned by appellant. A jury found that those discussions culminated in a contract, which appellant breached by his sale of the oven to a third party. We are not disposed to reverse the findings of the jury in that regard. However, we reverse that portion of the verdict pertaining to appellee's damages award, and remand for new trial on that issue.

When appellant sold the defective oven, and thereby breached his contract for sale to appellee, appellee covered his loss shortly thereafter by the purchase of a used oven for less than one quarter of the price which he had negotiated for the purchase of appellant's equipment. It appears, and it is not disputed, that the oven ultimately purchased by appellee is the functional equivalent of the more expensive model.

Although the trial judge warned the jury that their damages award should not be based upon speculation or conjecture, he allowed, with that caveat, their consideration of the issue of lost profits stemming from appellant's breach. This was error.

The law regarding damages for loss of profits has been clearly fixed: Although

> (t)he well-recognized general rule in this state is that anticipated business profits are too remote, speculative and contingent to warrant a judgment for their loss, ...

Touchette v. Bould, 324 So.2d 707 (Fla. 4th DCA 1975), nevertheless,

> (i)n Twyman v. Roell, 123 Fla. 2, 166 So. 215 (1936), the Supreme Court held that "if prospective profits form an elemental constituent of the contract, their loss, the natural result of its breach, and the amount can be established with reasonable certainty, such certainty as satisfied the mind of a prudent and impartial person, they are allowed. The requisite to their allowance is some standard, such as regular market values, or other established data, by reference to which the amount may be satisfactorily ascertained." (Emphasis supplied)

Welbilt Corp. v. All State Distributing Co., 199 So.2d 127 (Fla.3d DCA 1967).

Appellee's business venture was in its inception at the time of appellant's breach, and therein lies the trial court's error: Proof of profits for a reasonable time anterior to the breach is required to establish lost profits. *New Amsterdam Casualty Co. v. Utility Battery Manufacturing Co.*, 122 Fla. 718, 166 So. 856 (1936); *Innkeepers International, Inc. v. McCoy Motels, Ltd.*, 324 So.2d 676 (Fla. 4th DCA 1975), cert. denied 336 So.2d 106 (Fla. 1976); *Conner v. Atlas Aircraft Corp.*, 310 So.2d 352 (Fla.3d DCA 1975), cert. denied 322 So.2d 913 (Fla. 1975); *Ashland Oil, Inc. v. Pickard*, 269 So.2d 714 (Fla.3d DCA 1972), cert. denied 285 So.2d 18 (Fla. 1973). Where a record of past profitability is unavailable to inform a jury's deliberations, any finding it might make regarding lost profits must be purely speculative. Since appellee cannot establish past profits, he cannot claim lost profits resulting from appellant's breach.

On remand, damages should be determined in accordance with Section 672.712, Florida Statutes (1979):

> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages . . . but less expenses saved in consequence of the seller's breach.

The trial court should ensure that the issue of lost profits is not submitted to the jury.

Reversed and remanded.

Note

As may be noted from the various sale-of-goods remedies, the date of measuring damages differs depending on the nature of recovery. For example, the expectancy damage for a frustrated seller who resells is the price differential of *contract price minus cover price* (which is determined at the time of the resale). The expectancy for a buyer who does not cover is the price differential of *contract price minus market price when the buyer learned of seller's breach* (which is the moment when a non-breaching buyer could go out and secure an alternative source). This is where many students make the mistake of trying to memorize rather than to intuit. The following should demonstrate what is meant by intuiting:

For Sellers:

Resale: when would a seller know the price differential of contract price and resale price?
No Resale: when would a seller know the extent of the loss? (no resale and lost volume sellers)

For Buyers:

Cover: when would a buyer know the price differential between contract price and cover price?
No Cover: when would a buyer know the amount of loss of the value of a good bargain if seller does not deliver?

3. Special Rules on Warranty Damages

The rules on warranties in sale-of-goods cases are many, and their workings are somewhat intricate. There are warranties *on title* to goods (FLA. STAT. § 672.312 (2017)), as well those made matters of *on quality*, which are further broken down into two further categories: (1) those that are expressly made (FLA. STAT. § 672.313 (2017)); and in the absence of express warranties or valid disclaimers, those that are (2) are implied either for purposes of merchantability (FLA. STAT. § 672.314 (2017)) or for fitness for a known, particular purpose (FLA. STAT. § 672.315 (2017)). Each has its own unique elements and applications, as well as exceptions. There are also two further provisions worthy of special note. The first is the ability to exclude or to modify warranties. *See* FLA. STAT. § 672.316 (2017). The second concerns the limitation not of *warranty* but of *remedy* (such as a promise to repair or replace, to the exclusion of other damages). *See* FLA. STAT. § 672.719 (2017). One of the tricks of teaching is to test on the exceptions. In all likelihood, those who understand the exceptions to a rule also know the rule. This is a reason why exceptions are so often the subject of testing.

A. Requirements to Exclude the Implied Warranties

MCCORMICK MACHINERY, INC. v. JULIAN E. JOHNSON & SONS, INC.

District Court of Appeal of Florida, First District, 1988

523 So. 2d 651

SMITH, Chief Judge.

* * *

Appellant, McCormick Machinery, Inc. (McCormick), seeks reversal of the trial court's final judgment in favor of appellee, Julian E. Johnson & Sons, Inc. (Johnson), in which the trial court determined that Johnson could revoke acceptance of a bulldozer sold to it by McCormick, and that Johnson was entitled to recovery of damages it incurred in connection with the transaction. McCormick's argument on appeal focuses upon its contentions that the transaction was a “no-warranty” sale and, in addition, that the evidence was insufficient to establish that the bulldozer was in such defective condition when purchased as to justify Johnson's revocation of acceptance under the Uniform Commercial Code, section 672.608, Florida Statutes. In its final judgment, the trial court specifically found that the sale was a “no-warranty” transaction, but nevertheless found that the evidence concerning the defective condition of the bulldozer was sufficient to authorize revocation. Johnson cross-appeals the trial court's determination that the transaction was a “no-warranty” sale. We conclude that Johnson is correct on the issue raised by its cross-appeal, and we determine that the disclaimer of warranties relied upon by McCormick and the trial court was insufficient to disclaim the implied warranty of “merchantability,” under the Uniform Commercial Code, section 672.314, Florida Statutes (1985). Although we agree that the evidence tends to support the trial court's findings and Johnson's arguments on appeal that the bulldozer suffered from extensive defects, we find internal inconsistencies in the findings contained in the final judgment, and our review is further hampered by reason of the posture of the case as presented on appeal to this court. We conclude that the trial court's determination in Johnson's favor must be set aside for failure to apply the proper legal standards governing claims under an implied warranty of merchantability. We are therefore compelled to reverse and remand to the trial court for further proceedings.

The bulldozer in question was sold by McCormick to Johnson for $51,000.00. After a general inspection of the machine at McCormick's place of business, Johnson's representative was generally satisfied with the appearance of the machine and discussed with McCormick the installation of a yoke, which McCormick agreed to install. McCormick, at Johnson's request, made arrangements for the financing of the purchase with C & S Bank. On November 16, 1983, prior to the execution of the formal sales agreement, the bulldozer was delivered to Johnson, at which time its chief mechanic observed oil around the cylinder heads. A couple of days later, while being operated on its first job, the blade lifter arm broke off. Shortly thereafter, on the second job, the machine would go forward, but not backward, and it was discovered that the shifting rods, which were worn out and had been held together with baling wire, had come off. These problems were corrected.

The formal conditional sales contract was executed on December 12, 1983. On the front of this document, in bold-face print, appeared the attempted disclaimer of all express and implied warranties, as follows:

> Seller makes no warranties, expressed or implied, with respect to the property and Buyer accepts delivery hereof under the warranties (if any) of the manufacturer only.

Following execution of the sales contract, the bulldozer experienced a multitude of problems, including a defective steering clutch and two cracked cylinder heads, which necessitated major repairs in excess of $22,000.00. At the time of Johnson's revocation of acceptance, according to a finding made by the trial judge, the evidence revealed the need for a new undercarriage at a cost of some $16,000.00. The need for the first major repairs occurred approximately four months after delivery, at which time the bulldozer had been used only about 200 hours. There was testimony that with normal use a bulldozer should operate about 180 hours each month. Subsequent to the major repairs, the steering clutch continued to cause problems.

Finally, by letter dated November 14, 1984, one year after delivery of the bulldozer, Johnson informed McCormick of its intent to rescind the contract. During the one year period while the bulldozer was in Johnson's possession, it was operated for a total of approximately 300 hours, and was in the repair shop about five months of that time.

McCormick filed a replevin action, obtained possession of the bulldozer, and sought damages from Johnson. Johnson, in turn, filed a counterclaim for rescission of contract, breach of contract, and fraud in connection with the transaction. Following a nonjury trial, the trial court entered a final judgment in favor of Johnson, approving Johnson's revocation of acceptance and rescission of the sale, and awarded Johnson damages sustained by it in connection with the transaction. The trial court found no fraud.

Turning to the issues on appeal, we find it appropriate to deal first with Johnson's cross-appeal, asserting that the trial court erred in finding that the attempted disclaimer in the contract was effective as a disclaimer of all warranties in connection with the sale. We agree with Johnson's position that the disclaimer was not effective to eliminate all implied warranties, but not for the reasons asserted. Johnson argues that the disclaimer of warranties was not conspicuous, and further did not conform to the provisions of the Uniform Commercial Code because the disclaimer appeared in a document executed after delivery of the bulldozer, and was not a part of the bargain between the parties. The trial court disagreed, finding that the disclaimer was conspicuous within the meaning of section 672.316, Florida Statutes (1985), and effectively removed the property from the implied warranty provisions of the Florida Uniform Commercial Code. While we agree with the trial court's ruling that

the disclaimer was “conspicuous” and part of the bargain between the parties, we disagree with the finding that it was effective under provisions of the Code.

In addition to the express terms of a contract for the sale of goods by a merchant, the law imposes a contractual term promising quality; i.e., the goods must be merchantable. § 672.314(1), FLA STAT. (1985). However, a seller may limit his liability exposure by disclaiming the implied warranty of merchantability, provided the disclaimer mentions merchantability, and in the case of a writing, that it be conspicuous. § 672.316(2). In the case before us, as stated above, the contract states in bold-face type, in the middle of the page: “Seller makes no warranty express or implied, with respect to the property and Buyer accepts delivery thereof under the warranty (if any) of the manufacturer only.” While this disclaimer is conspicuous, *Rudy's Glass Const. Co. v. E.F. Johnson Co.*, 404 So.2d 1087 (Fla. 3rd DCA 1981), and *Monsanto Agr. Products Co. v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1982), it fails to mention “merchantability.” The issue, then, is whether this omission renders the attempted disclaimer ineffective. We conclude that it does.

We are not unmindful of section 672.316(3)(a), which provides: “Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is,’ or ‘with all faults,’ or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty....” At first blush, it might appear that under this section the clause found in the contract was sufficient to disclaim all implied warranties because the language “makes plain that there is no implied warranty.” § 672.316(3)(a). However, to permit a disclaimer couched in the terms used here to negate the implied warranty of merchantability would effect a literal rewriting of section 672.316(2) to exclude the requirement that the disclaimer mention “merchantability.” In *Rehurek v. Chrysler Credit Corporation*, 262 So.2d 452 (Fla. 2nd DCA 1972), cert. den., 267 So.2d 833 (Fla.1972), the court found that a disclaimer provision failing to mention the word “merchantability” was insufficient. Although the court specifically found that the disclaimer clause failed “for the lack of conspicuousness ...” (262 So.2d at 454), further discussion in the opinion emphasizes the necessity for use of the word “merchantability” in order to effectively exclude an implied warranty of merchantability. We find that most courts from other jurisdictions have similarly held that general language disclaiming warranties is insufficient to exclude the implied warranty of merchantability, thus enforcing the requirement that the word “merchantability” be included in the disclaimer. *E.g., see Two Rivers Co. v. Curtiss Breeding Service*, 624 F.2d 1242, *reh. den.*, 629 F.2d 1350, *cert. den.*, 450 U.S. 920, 101 S.Ct. 1368, 67 50.Ed.2d 348; Schultz v. Jackson, 67 Ill.App.3d 889, 24 Ill.Dec. 395, 385 N.E.2d 162 (1979); *Collins Radio Co. of Dallas v. Bell*, 623 P.2d 1039 (Okl.App.1980). *See also*, J. White and R. Summers, Uniform Commercial Code, § 12–5 (2nd Ed. 1980).

In summary, McCormick's obligation under the contract, in the light of the ineffective disclaimer, was to deliver to Johnson a specific used bulldozer of merchantable quality. Contrary to the ruling of the trial court, which found the disclaimer provision effective to exclude any and all express or implied warranties, we find the attempted disclaimer ineffective to exclude the implied warranty of merchantability. The question then arises: Upon what basis did the court find that the bulldozer was “nonconforming,” thus giving Johnson the right to revoke his acceptance of the machine?
The Uniform Commercial Code, as adopted in Florida, provides that a buyer may revoke acceptance of goods under certain conditions, as follows:

> [FLA. STAT. §§ 672.314 *was quoted in the original*]

The first requirement is that the goods must actually be “nonconforming.” Turning to the Code, we find that goods are “conforming,” or “conform to the contract,” when they are “in accordance with the obligations under the contract.” § 672.106. The parties' contractual obligations are determined by the language of the agreement itself, as well as the law governing commercial sales, Chapter 672, Florida Statutes (1985) (Uniform Commercial Code: Sales). The conditional sales contract here called for a used 1980 14C Fiat Alis Tractor (bulldozer), serial number 16688. It is undisputed that Johnson received this bulldozer, and that on delivery, it had all of its parts and was correctly assembled (with the possible exception of the baling wire holding the shifting rods in place which was corrected) and was operable.

As we have already determined, the law imposes upon a contract for the sale of goods by a merchant the requirement that the goods be “merchantable.” The requirement of merchantability therefore applies to the sale of the bulldozer by McCormick to Johnson, since, as we have determined, efforts by McCormick to disclaim this warranty were ineffective. Although the UCC does not define “merchantability,” section 672.314(2) sets minimum standards for merchantability. These are:

9. Pass without objection in the trade under the contract description; and

10. In the case of fungible goods, are of fair average quality within the description; and

11. Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and
quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

"Merchantability" is said to be a flexible concept which depends upon the description of the goods and the circumstances of the sale. Section 2–314, UCC Comments No. 3, 6; *Dickerson v. Mountain View Equipment Company*, 109 Idaho 711, 710 P.2d 621 (App.1985); *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458 (Okl.1980). The standard that must be met for used goods to meet the requirement of merchantability is necessarily different from that required as to new goods. It has been held that among the factors to be considered in determining the merchantability of used goods are (1) the extent of prior use, (2) the buyer's knowledge of the used goods, and (3) whether the price for the goods was significantly discounted at the time of sale. *International Petroleum Services, Inc. v. S & N Well Service, Inc.*, 230 Kan. 452, 639 P.2d 29 (1982). Further: "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description." Comment 3 to § 2–314, Uniform Commercial Code; *Fuquay v. Revels Motors, Inc.*, 389 So.2d 1238 (Fla. 1st DCA 1980).

Upon examination of the facts in the present case, we note initially that this heavy piece of equipment was traded in by a construction company to McCormick and then placed in McCormick's rental fleet prior to being sold to Johnson. Thus, it had undergone the heavy wear and tear normal in the construction business. Implicit in the characterization of the equipment as "used" is the possibility that individual components might be worn out or otherwise defective, necessitating replacement or repair. From a review of the record, we cannot say that the evidence conclusively demonstrates that the condition of the individual parts of the bulldozer were worse than might be expected in light of the age, prior use, and apparent condition of the bulldozer. Although there was considerable evidence as to the extent of the repairs and replacement of parts which became necessary during use by Johnson, whether this evidence demonstrates a lack of "merchantability" must be determined in the light of the circumstances of the transaction, including the bulldozer's type, age, history of prior usage, and the evidence of wear and tear obvious upon ordinary examination.

McCormick allowed the construction company from which it bought the machine a $40,000 trade-in allowance on the bulldozer, then sold it to Johnson for $51,000.00, a part of which was paid by credit for a $6,000 trade in of one of Johnson's old bulldozers. The record is silent as to the price of a new 14C bulldozer, and is also silent as to the price customarily paid for similar bulldozers in their used condition.

Turning once again to the findings of the trial judge in support of the ruling that Johnson was entitled to revoke acceptance of the bulldozer as "nonconforming," we find the following recitals in the final judgment:

> 12. The court finds ... that the tractor failed to conform to the reasonable expectations [of the buyer] after numerous attempts by the seller/plaintiff/counter-defendant to correct the problems and effect the repairs.
>
> 13. The court finds that the tractor did not conform to the reasonable expectations of the defendant/buyer, that the nonconformity substantially impaired the value of the goods to the buyer and, that the buyer did not know of the non-conformities when the tractor was accepted and that its acceptance was induced by the difficulty of discovering the nonconformity before acceptance and by the seller's assurance that the tractor was in good, operable condition.

The difficulty we encounter in accepting the trial court's ruling on the "nonconformity" issue, is that in order to be nonconforming, there must be some warranty or provision in the contract to which the goods must conform. "Absent any warranty by the lessor/seller in this situation there is nothing to which the goods must conform, ergo, there can be no nonconformity." *Konicki v. Salvaco, Inc.*, 474 N.E.2d 347 (Ohio App.1984).

The trial judge found, as previously noted, an effective disclaimer of all warranties, both expressed and implied. Under this finding, there could have been no nonconformity to the contract based on the condition of the machine. Substantial case law on this point holds that where there is a valid disclaimer of all warranties, including the warranty of merchantability, the remedy of revocation of acceptance for nonconformity is not available to a dissatisfied purchaser. *Konicki v. Salvaco, Inc., supra*; *Crume v. Ford Motor Co.*, 60 Or.App. 224, 653 P.2d 564 (1982); *and Clark v. Ford Motor Co.*, 46 Or.App. 521, 612 P.2d 316 (1980). *Cf., Seekings v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981). We note that implicit in the *Seekings* decision is the finding that the seller's oral representations were part of the contract and as such were not negated by a written disclaimer.

* * *

REVERSED and REMANDED.

WENTWORTH and JOANOS, JJ., concur.

B. Failure of Remedy Limitation of its Essential Purpose

VARNER v. B.L. LANIER FRUIT CO., INC.

District Court of Appeal of Florida, Second District, 1979

370 So. 2d 61

GRIMES, Chief Judge.

This appeal involves the enforceability of a liquidated damage clause.

According to the complaint, the parties entered into a written contract in which the grower agreed to sell and the buyer agreed to pick and buy all of the fruit of merchantable quality from the grower's grove on or before February 9, 1977. The agreement contemplated the sale of approximately 22,000 boxes and specified the price to be $1.25 per box. The contract contained the following clause:

> The Buyer has this day advanced to the Grower the sum of $11,000, the receipt of which is hereby acknowledged by the Grower which sum is an advance and part payment for said fruit at the price above stated. All fruit at the price aforesaid shall be paid for from time to time as the fruit is picked, or within 10 days thereafter. Should Buyer fail to comply with the terms and conditions herein enumerated this contract shall therefore become null and void and the advance made to the Grower shall be retained by said Grower in full payment of liquidated damages.

The grower alleged that the buyer picked 12,000 boxes but failed or refused to pick the remainder as required by the contract. There were 9,500 boxes of merchantable fruit left on the trees which the grower was unable to sell elsewhere. The buyer had paid the grower $16,000 on account of the agreement. The grower claimed damages from the buyer for breach of contract.

The buyer obtained a judgment on the pleadings on the premise that the grower was limited to the recovery of the $11,000 liquidated damages specified in the foregoing provision, and that the grower had already collected a sum in excess of that amount. We reverse.

This transaction was controlled by Article 2 of the Uniform Commercial Code, Chapter 672, Florida Statutes. See Sections 672.102, 105(1), 107(2), Florida

Statutes (1975). On the subject of liquidated damages, Section 672.718(1), Florida Statutes (1975), states:

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

This is consistent with pre-Code law. See Hyman v. Cohen, 73 So.2d 393 (Fla.1954). Although there is no specific reference to the possibility of an unreasonably small liquidated damage figure, the official comment under this section notes:

> A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

The section on unconscionable contracts or clauses is Section 672.302(1), Florida Statutes (1975), which states:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

While most cases on liquidated damages occur where the stipulated sum is unreasonably high, there are some pre-Code decisions in which the complaining party demonstrated that the liquidated figure was so inadequate as to justify the court permitting him to recover his actual damages. *Bonhard v. Gindin*, 104 N.J.50. 599, 142 A. 52 (1928); *Manley Auto Co. v. Jackson*, 115 Or. 396, 237 P. 982 (1925); *Palestine Ice, Fuel & Gin Co. v. Walter Connally & Co.*, 148 S.W. 1109 (Tex.Civ.App.1912); *Cf. Demont v. Charlotte Associates, Inc.*, 286 So.2d 586 (Fla. 1st DCA 1973). Here, then, the grower would be entitled to a further recovery if he can prove the unconscionability of the liquidated damages clause.

Absent a finding of unconscionability, the grower may still find relief in Section 672.719(2), Florida Statutes (1975), which provides:

> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.

There may have been good reason to enforce the liquidated damages provision in this case had the buyer utterly failed to perform the contract. However, according to the complaint the buyer had already picked enough fruit to use up the deposit. If the grower's recovery is limited to the amount of the deposit, he will be entitled to no damages whatsoever for the buyer's failure to pick the remaining 9,500 boxes.(Footnote omitted) Therefore, this could easily be a case in which the circumstances have caused an exclusive or limited remedy to fail of its essential purpose so as to permit the grower to pursue the other remedies provided by the Code. *See* Sections 672.703-710, Florida Statutes (1975).

The test to be applied in determining the propriety of a judgment on the pleadings for the defendant is the same as if the defendant had moved to dismiss the complaint for failure to state a cause of action. *Chance v. Chance*, 362 So.2d 165 (Fla. 1st DCA 1978). Upon the principles set forth above the grower clearly alleged a cause of action.(Footnote omitted)

REVERSED and REMANDED.

OTT and RYDER, JJ., concur.

Problem 11-5

Brett owns a flower shop and sells vases in his store. He contacted Susan’s Vases, a merchant who makes vases to sell to shops such as Brett’s, to restock his supply of vases. Brett placed an order for $400 worth of vases to hold flowers to be sold in his shop. The purchase contract between Brett and Susan’s Vases included a disclaimer of all warranties, which Brett agreed to in the contract. Upon timely delivery of the vases, Brett discovered that the vases completely disintegrated when they are filled with water. May Brett recover any damages against Susan’s or is he barred? If so, what damages may he seek?

4. Liquidated Damages

This is the U.C.C. Article 2 counterpart to the common law, and they are quite similar (and for progressive jurisdictions’ form of the common law, virtually identical). Florida has adopted the U.C.C. Article 2’s liquidated damages code provision. As you may have remembered reading in Chapter X, liquidated damages are a predetermined measurement of damages in the event of a

breach that are contemplated at the time of contracting. Court have a long history of not enforcing liquidated damages clauses in breach of contract disputes, so the codified version in FLA. STAT. § 672.718(1) (2017) has certain requirements in order to be enforceable upon the parties:

FLA. STAT. § 672.718. Liquidation or limitation of damages; deposits

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

* * *

Problem 11-6

Supply Superstore, a seller of office supplies, entered into a written contract with Bradley's Office Store to supply Bradley's store for $7,500 with new desks, office chairs, among other detailed items. Supply Superstore agreed to deliver the goods to Bradley's by October 1. The written agreement included the following provision as follows: "Time is of the essence. If Supply Superstore does not deliver the agreed upon goods by October 1, Supply Superstore will pay $50 in damages for every day that the goods are not delivered, damages to double each week Supply Superstore is late." If Supply Superstore is unable to deliver the goods by October 1, will Bradley's Office Store's liquidated damages provision survive a court's scrutiny? What if it was $750 a day instead of $50?

Notes

19. Compare the U.C.C. Article 2-based liquidated damages requirements to those for common law liquidated damages clauses from the last Chapter. Are there any differences even a small one? You may find a chart of comparison at www.mylegs.org under "Informative Slides" and Tab 6(d).

20. The U.C.C. Article 2, and state codifications of it, set out special rules in the case of *installment contracts*, i.e. contracts that call for multiple performances. An example would be a one-year contract to provide monthly deliveries of a good – there is one contract, but in a way, there are numerous, one-month, mini contracts. The most unique aspect of installment contracts relates to what happens in case of breach by the seller. Whatever the remedy (provided in this

Chapter), a non-breaching buyer may only receive the remedy for the problematic installment – unless the breach of a particular installment basically frustrates the value or purpose of the entire contract. More accurately, a buyer may reject a substantially non-conforming tender of performance, but must continue to perform with regard to the remaining performances (*see* FLA. STAT. § 672.612(1) (2017)), unless the breach of a particular installment *substantially impairs the value of the whole contract*. FLA. STAT. § 672.718(2) (2017). While the standard is the same (i.e., *substantial impairment*), the burden is raised from proof of substantial impairment of one installment to one of proving that the bad installment substantially impairs the value of the entire agreement. The fact that a buyer may not reject an entire contract for the breach of a single installment, unless there is substantial impairment to the entire contract, stands as a unique exception to the *perfect tender rule*.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 11

(29) The difference between incidental and consequential damages and which party is entitled to receive either form (or both)
(30) The difference between excluding or limiting warranties and limiting damages
(31) The concept of *obiter dicta* or *dicta*
(32) The concept of a deficiency judgment
(33) Case precedent that is distinguishable

SUGGESTED EXERCISE(S)

26. The *Varner* case at the end of this Chapter was also reported in The Uniform Commercial Code Reporter Service at 26 UCC REP SERV. 716. Instruct the students to find this either on the library shelves or through electronic legal research sources to demonstrate a resource for quickly finding state cases addressing particular U.C.C. Article 2-based provisions.

Chapter 12: EQUITABLE REMEDIES

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The last three Chapters addressed *legal*, or monetary, damages. The U.S. legal tradition derives from the common law of Great Britain, which maintained two legal systems: one of law, and one of equity. Law courts could provide for money damages in the case of contractual breach. Courts of equity were empowered to craft more unique forms of remedy out of fairness. In prior times, claimants would have to select one or the other court. However, most state legal systems have now merged law and equity such that the same court may grant either form of relief. For a discussion of the merger of law

and equity generally, *see, e.g.,* A. Friedberg, *The Merger of Law and Equity*, 12 ST. JOHN'S 50. REV. 317 (2014). There is an interesting dissenting opinion in *Hutchens v. Maxicenters, U.S.A.*, 541 So. 2d 618 (5th DCA 1988) which explains Florida's history on merger of law and equity (effectuated by the Florida Supreme Court in 1954) and advocates the maintenance of the distinctions between them now that they are administered by a single court after the merger.

There are more than several forms of equitable remedy. Several of them involve court orders to do something or refrain from doing something. Others call for the payment of monies based on the value of something, but *not* based on the contract price. First, however, are the remedies of rescission (cancelling the contract, possibly with damages) and of reformation (amending something in the contract to reflect what the parties actually intended).

21. Court Actions in Equity

These are actions that courts may take directly with the documents themselves.

19. Changes To or Cancellation of a Contract

There are two basic ways for courts in equity to change contracts themselves. Each has its own special requirements, but both still require that there be no adequate remedy at law.

(1). Rescission

STEAK HOUSE INC. v. BARNETT

Supreme Court of Florida, 1953

65 So. 2d 736

SEBRING, Justice.

The appellant was the plaintiff below. It instituted suit to rescind a contract entered into with the appellee. The trial court granted a motion to dismiss the complaint and this appeal followed.

According to the complaint and the exhibits, the plaintiff was the lessee of certain premises on which were located businesses known as the Singapore Lounge and the Fisherman's Wharf. The premises were being managed and operated by the defendant under an agreement between the plaintiff and the

defendant. Prior to the agreement hereafter referred to the plaintiff had sublet certain portions of the premises to other persons.

On April 10, 1952, the plaintiff entered into an agreement with the defendant whereby (1) all prior agreements between the parties in conflict with the pending agreement were terminated and cancelled; (2) all rights and interests of the plaintiff in and to the lease and the subleases and to the furniture and fixtures on the premises were assigned to the defendant; (3) all obligations of the plaintiff under its lease and subleases were assumed by the defendant; (4) the defendant assumed and agreed to pay all indebtedness of the plaintiff up to the sum of $18,000; and (5) the defendant agreed to indemnify and hold the plaintiff harmless against any claim or claims on account of the $18,000 indebtedness.

The complaint instituted in this cause for rescission of the agreement averred performance on the part of the appellant and the failure and refusal of the assignee to pay the indebtedness of the assignor as agreed. The bill further alleged that the promise made by the assignee to pay the indebtedness 'was false and fraudulent and was known to the defendant to be false and fraudulent at the time it was made; that, in truth and in fact, at the time defendant made and entered into the said agreement he did not intend to assume and pay the indebtedness of the plaintiff * * * and that defendant made the said false and fraudulent statements and representations to plaintiff [who did not know of the falsity thereof and relied thereon] to induce plaintiff to execute the agreement.'

The bill of complaint further alleged that the plaintiff did not have an adequate remedy at law; that the defendant 'has no visible property open to attachment or levy known to plaintiff other than the subject matter hereof,' and that 'plaintiff is willing and able and hereby offers to do equity herein and to repay to defendant any amounts * * * found to be due and owing from the plaintiff to the defendant in order to place the parties hereto in the status quo existing at the time of the execution of such agreement.'

The plaintiff urges on this appeal that the court below committed reversible error in granting the motion to dismiss the bill of complaint for failure to state a claim upon which relief could be granted. The question before us is whether, assuming that the allegations of the bill are true, and that there has been a breach of the covenant in question, the plaintiff should be entitled to rescission in equity or whether it must be left to its remedy at law for damages.

As a general rule, rescission is granted for fraud as to existing fact, but not for failure to perform a covenant or promise to do an act in the future, unless the covenant breached is a dependent one. *Beach v. Williamson*, 78 Fla. 611, 83 So. 860, 9 A.L.R.. 1438; *Harrington v. Rutherford*, 38 Fal. 321, 21 So. 283. See

also 9 Am.Jur., p. 373. Conditions or covenants in a contract are classed as dependent or independent from a consideration of the intention and understanding of the parties as shown by the whole contract. *Southern Colonization Co. v. Derfler*, 73 Fla. 924, 75 So. 790, 50.R.A.1917F, 744.

A covenant is independent where it does not go to the whole consideration of the contract but is only subordinate and incidental to its main purpose, and the breach of such a covenant will not ordinarily constitute a sufficient reason for rescission. 17 C.J.S., Contracts, § 425, pages 910-911.

A covenant is dependent where it goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted. Black on Rescission and Cancellation, 2nd ed., Vol. I, pp. 555, 601. A breach of such a covenant amounts to a breach of the entire contract; it gives to the injured party the right to sue at law for damages, or courts of equity may grant rescission in such instances if the remedy at law will not be full and adequate. *Savage v. Horne*, 159 Fla. 301, 31 So.2d 477; 6 Pomeroy, Eq. Juris., Sec. 685.

Where at the time of the execution of a contract the party promising to perform an act in the future has a secret undisclosed intent not to carry it out but fraudulently represents that he will perform as an inducement to the other party to enter into the contract, this fraud is ground for rescission in equity, whether the act to be performed constituted the entire consideration or not. *Pryor v. Oak Ridge Development Corp.*, 97 Fla. 1085, 119 So. 326; *Alechman v. Edwards*, Fla., 56 So.2d 327. The right to rescind in such a case is not bottomed upon the breach of the promise but upon the fact that fraud was practiced in the inception as to an existing material fact, namely the existing state of mind of the promisor, and the opposite party was thereby induced to enter into the contract. *Collins v. McKelvain*, 138 Fla. 463, 189 So. 655; Restatement of Contracts, Sec. 473.

In either of the above situations, where the bill is based on breach of a dependent covenant or upon fraud, equity will not usually order rescission unless the condition of the parties as it existed prior to the execution of the contract can be restored. *Pryor v. Oak Ridge Development Corp., supra; Southern Colonization Co. v. Derfler, supra.*

Construing the complaint and exhibits before us in the light of all conditions and circumstances, we do not think it can be said that the complaint was wholly without equity. Although the covenant alleged to have been breached by the defendant did not go to the entire consideration of the contract, we think it is such that the plaintiff would not have entered into the contract with that provision omitted.

The charge is made in the complaint that at the time the contract was executed the defendant did not intend to carry it out yet fraudulently made the representation that he would do so in order to induce the plaintiff to part with valuable considerations. The allegation is also made to the effect that the defendant is insolvent, except for the property gotten from the plaintiff by means of the fraudulent representations. As already stated, there are allegations in the complaint that the plaintiff 'is willing and able and * * * offers to do equity * * * and to repay to defendant any amounts * * * found to be due and owing from the plaintiff to the defendant in order to place the parties * * * in the status quo existing at the time of the execution of such agreement.'

While the complaint is by no means a model of pleading, we hold that it does not wholly fail to meet the requirements of the decisions, and that consequently plaintiff should be given the opportunity to prove the issues tendered if it can do so. From this conclusion it follows that the decree appealed from should be reversed with directions that further proceedings be had in the court below in accordance with law and in conformance with this opinion.

It is so ordered.

ROBERTS, C. J., and TERRELL and MATHEWS, JJ., concur.

Note

The distinction between dependent and independent covenants is addressed in Chapter 18. Not to leave one hanging, the essence of this distinction is that where a contract contains a condition, small ones (*independent*) may be pursued legally but would generally not permit treating the agreement as breached; more major conditions (*dependent*) could allow suspension of obligations, potential rescission of the agreement, etc.

(2). Reformation

CONTINENTAL CAS. CO. v. CITY OF OCALA

Supreme Court of Florida, 1930

99 Fla. 851

BUFORD, J.

Baker & Foulks, Inc., was a construction contractor. The city of Ocala contracted with Baker & Foulks, Inc., for the construction of certain streets in the city of Ocala. Baker & Foulks, Inc., agreed in its contract with the city to post a surety bond in an amount equal to 100 per cent. of the contract within fifteen days after notice of acceptance of bid. A proposed form of bond was submitted with the proposal for bids and was accepted by the contractor as constituting a part of the obligation which it assumed in submitting its bid. The condition in that proposed bond was as follows:

'Now therefore, if the said principal shall and truly comply with and perform each and and of the terms, covenants and conditions of the same on his part to be kept and performed according to the tenor thereof, and he will perform the work embraced therein upon the terms proposed and in the time prescribed and in accordance with the plans, profiles, and specifications furnished thereof, and shall fully and promptly pay all claims for supplies, labor and materials used in the construction thereof; any direct or indirect damages that shall be suffered or claimed during the construction of said improvements by reason of the construction thereof, and until the same is accepted, and if the above principal, his successors, heirs, executors, administrators, or assigns shall deliver the same to the _____ free from all claims of adjoining or neighboring properties for damages or trespass, and free from all claims of damage of whatever nature by the said _____, its officers, agents, or employees, then this obligation to be null and void, otherwise to remain in full force and virtue in law, and said surety hereby stipulates and agrees that no change, extension, alteration, deduction or addition, in or to the details of the plans covered by said contract shall in any wise affect the obligations of said surety on its bond.'

The contractor did not give the bond as specified. In fact, the contractor did not execute any bond at all. The amount of the contract was approximately $133,000. It appears from the argument of counsel that the actual amount of the contract was about $128,000. That is, we gather, that it was estimated that the contract would run to $133,000, while, as a matter of fact, it ran only to $128,000.

The bond, instead of being for 100 per cent. of the contract, was for $64,000, which was not more than 50 per cent. of the contract. The condition of the bond was entirely different from that proposed by the city and agreed to be posted by the contractor. The material difference being that there was no obligation contained in the bond posted binding the surety company to 'promptly pay all claims for supplies, labor and materials used in the construction thereof'; but, on the contrary, it did contain the following provisions:

'That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee herein named; and that the obligation of the surety is, and shall be construed strictly as, one of suretyship only, shall be executed by the principal before delivery, and shall not, nor shall any interest therein or right of action thereon, be assigned without the prior consent, in writing, of the Surety.'

The bond was executed by the surety company, but was not executed by the principal, the contractor.

After the work was completed, some claims were filed against the city for material furnished under the contract, and thereupon the city filed suit to reform the bond in such manner as to make the surety liable for the unpaid claims of the materialmen.

There was a demurrer to the bill of complaint which was overruled.

From the order overruling the demurrer, appeal was taken.

The bill of complaint fails to show that there was ever any agreement upon the part of the surety to execute a bond containing the provisions which appear in the blank bond attached to the specifications, and the bond which was executed by the surety company shows upon its face that it was not the purpose or intention of the surety company to execute a bond guaranteeing that the contractor would pay all claims for labor and material, and that it was not the purpose or intention of the surety company to execute a bond which would create a liability against the surety company in favor of any party except the obligee named in the bond, to wit, the city of Ocala.

In the case of *Rosenthal v. First National Fire Insurance Co.*, 74 Fla. 371, 77 So. 92, this court say:

'An insurance policy as issued and accepted is prima facie the contract of the parties; and, in order to have it reformed, the burden is on the plaintiff to show that a different contract was entered into from that which was reduced to writing, and this fact must be proved by clear, convincing, and satisfactory evidence, not alone by a preponderance of the evidence, but he must establish the fact by such evidence as to show conclusively that a mistake had been made, that such mistake was mutual to both parties, and to satisfy the court of such mistake beyond a reasonable doubt.'

Before that time, in the case of *Phenix Insurance Co. v. Hilliard*, 59 Fla. 592, 52 So. 799, 800, 138 Am. St. Rep. 171, the court say:

‘Where by inadvertence or otherwise a policy of fire insurance is issued contrary to the intention of the parties thereto, a court of equity may in a proper case reform the policy so as to make it express the real agreement and intention of the parties, and as so reformed to enforce the policy in order to do complete justice in the controversy. * * *

‘The right to the reformation of an instrument is not absolute, but depends on an equitable showing.’

And again when the same case came to this court on appeal from final decree, *Fidelity Phenix Fire Insurance Co. v. Hilliard*, 65 Fla. 443, 62 So. 585, 586, in an opinion written by Mr. Justice Taylor, the court say:

‘It is well settled that when a policy of insurance as issued does not conform to the contract which it purports to evidence, and the insured accepts the policy in the belief that it does conform to his contract, a court of equity will reform the instrument; and that after a loss has occurred the reformation of the policy and judgment for the loss may be had in the same action. But in reforming a policy of insurance, like that of any other written contract, the want of conformity to the agreement of the parties must be occasioned by a mistake which is mutual and common to both parties to the instrument. A mistake on one side may be a ground for rescinding, but not for reforming, the contract. Where the minds of the parties have not met, there is no contract, and hence none to be rectified.

‘It is equally well settled that an insurance policy as issued and accepted is prima facie the contract of the parties; and, in order to have it reformed, the burden is on the plaintiff to show that a different contract was entered into from that which was reduced to writing, and this fact must be proved by clear, convincing, and satisfactory evidence, not alone by a preponderance of the evidence, but he must establish the fact by such evidence as to show conclusively that a mistake had been made and to satisfy the court of such mistake beyond a reasonable doubt. 16 Am. & Eng. Ency. of Law, pp. 869 and 879, and numerous citations*; Horne v. J.C. Turner Cypress Lumber Co., 55 Fla. 690, 45 So. 1016; Indian River Mfg. Co. v. Wooten*, 55 Fla. 745, 46 So. 185; *Prior v. Davis*, 58 Fla. 510, 50 So. 535. Guided by these rules we are of the opinion, after careful consideration of the evidence submitted in the record, that it does not justify the reformation decreed in this case. There is no proof that, if there was a mistake made in the policy as written and delivered, such mistake was mutual to both parties to the contract.’

Whether or not the surety company is bound by the bond posted to reimburse the city in event the city is required to pay the claims of the materialmen referred to in the bill of complaint is a question not presented in this case. Neither is the question of the city's liability to the materialmen presented in this case.

The sole question here is whether or not the city is entitled in a court of equity to have the bond reformed so as to make the surety liable for the claims of the materialmen, and we hold that under authority of the well-settled rule in this state as enunciated in the cases above cited, the bill does not state a case which shows the city to be entitled to such relief, and therefore the order overruling the demurrer should be reversed. It is so ordered.

Reversed.

WHITFIELD, P. J., and STRUM, J., concur.

TERRELL, C. J., and ELLIS and BROWN, JJ., concur in the opinion and judgment.

Notes

33. Can you see why the City of Ocala seeks reformation? (It is not only for the lowered amount of the bond).

34. It is interesting that in the *Continental Cas. Co.* case the court majority distinguished mutual mistake from unilateral mistake and indicated that only the former would qualify for reformation rather than for rescission. Mutual mistake, unilateral mistake, and other defenses to enforcement of a contract are explored further in Chapters XXIV – 26.

Problem 12-1

Contractor, in competition with other contractors, submitted a bid to Church for some significant remodeling. Unfortunately, Contractor's secretary hit the capital letter "O" key rather than the "9" key such that the bid price read "$100,000" instead of the intended "$190,000." Church was quite happy with the bid, which turned out to be the lowest bid by about $40,000. Church notified Contractor that it had accepted Contractor's bid. What are Contractor's options with regard to the acceptance of its bid? *See also First Baptist Church of Moultrie v. Barber Contracting Co.*, 189 Ga. App. 804; 377 S.E.2d 717 (Ct. App. Ga. 1989); 2 A.L.R..4th 991 §3a (2017). Why is rescission the proper remedy and not reformation?

B. Court-Ordered Action or Inaction

In equity, courts may also order the parties to act (or not to act) in certain ways based on an assessment of what is fair in light of the contract(s) and surrounding circumstances. Recall that litigants "pray" for relief and that courts have significant leeway in crafting appropriate remedies. The following cases address common-law cases rather than those concerning the sale of goods. However, use of these very same doctrines in sale-of-goods cases is not precluded. In fact, U.C.C. Article 2 and the state statutes adopting it include separate provisions for certain kinds of equitable relief. As the organization of this book has been to clearly distinguish common law from sale-of-goods law as much as possible, the sale-of-goods provisions are set out in the last section of this Chapter. A quick review of them indicates that they are merely the U.C.C. Article 2 embodiment of the same kinds of equitable principles developed at common law.

(1). Specific Performance

HOGAN v. NORFLEET

District Court of Appeal of Florida, Second District, 1959

113 So. 2d 437

MOODY, JAMES S., Associate Judge.

Appellant, plaintiff below, brought a suit for specific performance after exercising his option to purchase a franchised bottled gas business. The appellee, defendant below, filed a motion to dismiss and, upon hearing, the court dismissed the complaint, or in the alternative, granted plaintiff leave to file a suit on the law side of the court. To this order plaintiff filed interlocutory appeal.

Defendant is the owner of Norfleet Gas and Appliance, a bottled gas business based on a franchise covering a particular territory. The complaint alleges that in October, 1951, defendant induced the plaintiff to enter his business stating that he needed help in his business and planned to retire; that if the plaintiff would work for him the defendant would sell his business to the

plaintiff and that in furtherance thereof, in December 1952, the parties signed a written option setting forth the price and terms under which the plaintiff could purchase said business if such option were exercised. The complaint further alleges plaintiff exercised his option in October, 1957, but that the defendant has failed and refused to transfer said business to the plaintiff; that said business is prosperous; that it is the type of business and franchise which cannot be obtained in the open market; that the plaintiff fully performed his part of the agreement, and, that defendant should be required to convey all of the assets of said business including the franchise and privileges of such business.

The sole point argued on appeal and the only point covered in this opinion is whether or not specific performance should be granted for the sale of the business as set forth in the complaint. The general rule is that, although the remedy of specific performance is available to enforce contracts for the sale of realty, specific performance of contracts relating to personal property will not be enforced for the reason that ordinarily compensation for breach of contract may be had by way of an action at law for damages. Such an action would be regarded as fully adequate.

The apparent reluctance of equity to grant specific performance of contract relating to personalty does not arise from any less regard for contracts involving contracts for personalty than for those involving realty, but is simply a corollary of the principle upon which equity acts in decreeing specific performance, namely, the inadequacy of the remedy at law for damages. Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular property in question, while those which relate to personal property can generally be fully satisfied by damages which enable the injured party to obtain elsewhere in the market similar property to that which he had agreed to purchase. However, if, from the nature of the case and the property involved, an adequate remedy at law does not exist, equity will enforce the contract. Courts only weigh such contracts with greater nicety. 49 Am.Jur. 148. *Yulee v. Canova*, 11 Fla. 9.

Our Florida courts have held that specific performance of a contract is a matter of equitable cognizance as applied both to real and personal property, and where, in the case of personal property, it is of a peculiar character and value, specific performance will be granted. *Fraser v. Cohen*, 159 Fla. 253, 31 So.2d 463. Also, when the value of the property involved is uncertain or not readily ascertainable in the open market, or if the damages resulting from the breach of the contract are too uncertain or indefinite, specific performance will be granted. Damages in a law action cannot be speculative or conjectural, but must be reasonably ascertainable. Thus Florida courts have decreed specific performance of a contract granting an exclusive franchise to export bananas, a contract for the purchase of a liquor license, contracts for purchase of corporate stock of a closed or closely held corporation, and for the

purchase of a restaurant. *Fraser v. Cohen, supra*; *House v. Cotton, Fla.*, 52 So.2d 340; *Baruch v. W. B. Haggerty, Inc.*, 137 Fla. 799, 188 So. 797; *Lewis v. Arthur, Fla.*, 72 So.2d 397; *Legg v. Hill, Fla.*, 42 So.2d 168. Sale of businesses including franchises and good will have frequently been the subject of specific enforcement in equity. 49 Am.Jur. 151. *Also see* Annotation in 152 A.L.R.. 4. The reasons advanced decreeing specific enforcement are that franchises and good will of a business or the value of a going business and the profits involved cannot be readily ascertained and the estimation of value would be so indefinite recovery would not furnish a complete and adequate remedy at law. *Chamber of Commerce v. Barton*, 195 Ark. 274, 112 S.W. 619; *Garbar v. Siegel*, 194 Misc. 966, 87 N.Y.S. 597. Specific performance has been decreed on a contract to sell merchantable natural gas. *Southwest Pipe Line Co. v. Empire Natural Gas Co.*, 8 Cir., 33 F.2d 248, 64 A.L.R.. 1229.

In the case now before us, it appears the contract of sale involves a going business including good will and an operating franchise covering a particular territory. Obviously, such a franchise would not be available in the open market and its value would be very difficult, if not impossible, to ascertain. The value of good will or of a going business is an intangible asset of an indefinite, speculative or uncertain value. The contract executed in 1952 provides the method of determining the purchase price. However, the measure of damages in an action at law would entail the determination of the present value of such business which involves elements of going business value, good will and prospective profits. Certainly these are matters which cannot be readily ascertainable or fixed and could not conform with the rule in a law action that any recoverable damages must be susceptible to reasonable ascertainment.

For the reasons stated the decree is reversed and the cause is remanded for further appropriate proceedings.

KANNER, C. J., and SHANNON, J., concur.

(2). Injunctions

The following cases demonstrate the reluctance of courts to grant equitable relief – it should only be awarded in special situations and only when there is no adequate remedy at law. The *Seaescape* case also distinguishes temporary from permanent injunction and makes clear that temporary injunctions, which are “extraordinary,” are harder to secure than permanent injunctions. The *Montaner* case also makes these points, and adds a very brief discussion of the requirements and difficulties of enforcing non-U.S. judgments, which would be addressed more fully in a Civil Procedure course.

Just as a helpful note, the second case deals with the same issue/rules, but it contains the added dimension of an international case with a foreign judgment.

SEAESCAPE, LTD., INC. v. MAXIMUM MARKETING EXPOSURE, INC.

District Court of Appeal of Florida, Third District, 1990

568 So. 2d 952

COPE, Judge.

Appellant SeaEscape, Ltd., Inc., defendant below, appeals non-final orders which entered an ex parte temporary injunction, denied SeaEscape's motion to dissolve it, and denied SeaEscape's motion to increase the injunction bond. We reverse.

SeaEscape, operator of cruise ships sailing from Miami, entered into two employment agreements, one with appellee Maximum Marketing Exposure, Inc., and the other with appellee Joseph M. Panebianco, both of whom were plaintiffs below. Under the employment agreements, Panebianco served as SeaEscape's Vice President of Sales and Marketing, for which he received a salary and other compensation. Maximum Marketing was employed to operate the Tour Reservations Department of SeaEscape, which involved booking certain tour passenger business. For this service Maximum was to be compensated at a specified rate per traveler. Both contracts were terminable for good cause. Disputes involving the contracts were to be resolved by arbitration.

On May 10, 1990 SeaEscape notified Panebianco that his contract was terminated effective immediately, and notified Maximum Marketing that its contract would terminate effective June 15, 1990. On June 7, 1990 plaintiffs filed a demand for arbitration with the American Arbitration Association. The same day, plaintiffs filed a complaint seeking a temporary injunction to enforce both contracts pending resolution of the parties' dispute by arbitration. On June 8 plaintiffs obtained an ex parte temporary injunction which required SeaEscape to perform both contracts pending further order of the court. The injunction required SeaEscape to reinstate Panebianco and to maintain the Maximum Marketing contract in full force and effect. The plaintiffs' ex parte motion requested an injunction bond of $500, and during the ex parte hearing the trial court set the injunction bond at $1,500, which plaintiffs posted.

SeaEscape promptly moved to dissolve the injunction, which relief was denied. SeaEscape also moved to increase the amount of the injunction bond, and

submitted an affidavit requesting a one million dollar bond. SeaEscape brought witnesses to the hearing prepared to testify in support of a higher bond. The trial judge found that an evidentiary hearing would be needed on the motion to increase the bond, but stated that he had no time available to conduct the hearing. The judge stated, therefore, that the bond would not be changed at that time, and that another judge would have to conduct the evidentiary hearing. Plaintiffs specifically agreed that an evidentiary hearing would be necessary.

Although the trial judge had made it very clear that an evidentiary hearing would be required on the motion to increase the amount of bond, inexplicably the court's written order provided that "the Defendant's Motion in the Alternative to Increase the Amount of the Bond is denied and Plaintiffs' bond shall remain at $1,500." [Footnote omitted] SeaEscape filed an emergency motion for rehearing on that issue, [footnote omitted] and requested that the administrative judge assign a judge for an evidentiary hearing on the amount of bond. Although they had previously conceded before the initial judge that an evidentiary hearing would be necessary, plaintiffs wrote to the administrative judge opposing SeaEscape's request for a hearing. Plaintiffs' letter indicated that the trial judge had already conducted two hearings on the issuance of the temporary injunction, accused SeaEscape of "blatant forum shopping," requested "that Defendant's counsel be admonished for his conduct," and asked "that his request for still another hearing on this matter be summarily denied." The requests for evidentiary hearing were denied, the motion for rehearing was denied without a hearing, and the bond remained at $1,500. SeaEscape appealed.

It is plain that the injunction should not have been entered in the first instance, and the motion to dissolve should have been granted. The contracts at issue here are ordinary contracts for employment or personal services. Such contracts are not enforceable by injunction or specific performance. *E.g., Shearson Lehman Hutton, Inc. v. Meyer*, 561 So.2d 1331 (Fla. 5th DCA 1990); *Mosely v. De Moya*, 497 So.2d 696, 697 (Fla. 3d DCA 1986); *Mike Smith Pontiac GMC, Inc. v. Smith*, 486 So.2d 89, 90 (Fla. 5th DCA 1986); *see* Restatement (Second) of Contracts § 367(1)(1981); 11 S. Williston, A Treatise on the Law of Contracts § 1423 (3d ed. 1968); 5A A. Corbin, Corbin on Contracts §§ 1204–09 (1964). The appropriate remedy in such cases is an action for damages for breach of contract. *Mosely v. De Moya*, 497 So.2d at 698.

Plaintiffs contend, however, that they may avoid the general rule just stated by reliance on *Bowling v. National Convoy & Trucking Co.*, 101 Fla. 634, 135 So. 541 (1931). *Bowling* is of no assistance to plaintiffs. First, *Bowling* reiterates the general rule that "personal contracts for service will not ... be enforced by courts of equity." *Id.* at 638, 135 So. at 544. Under Bowling, an agreement to exchange services for compensation or commissions—the

situation now before us—is not subject to equitable enforcement. *Id*. While *Bowling* recognized a narrow exception to the general rule, plaintiffs do not qualify for it. [Footnote omitted] Second, assuming arguendo the contracts did qualify for the Bowling exception, plaintiffs nonetheless would be unable to satisfy the temporary injunction standards, for they have an adequate remedy at law. *See Oxford Int'l Bank & Trust, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith*, 374 So.2d 54, 56 (Fla. 3d DCA 1979), *cert. dismissed*, 383 So.2d 1199 (Fla.1980). [Footnote omitted] Plaintiffs contracted to render services in exchange for money, and their damages are calculable based, inter alia, on the contract amounts. [Footnote omitted] As there is an adequate remedy at law, injunctive relief must be denied. We therefore dissolve the temporary injunction effective immediately. [Footnote omitted]

The trial court also erred in failing to conduct an evidentiary hearing on SeaEscape's motion to increase the injunction bond. SeaEscape was entitled to an emergency evidentiary hearing within the time set by Rule 1.610(d), Florida Rules of Civil Procedure. *See Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So.2d 1018, 1021 (Fla.1989) (treating motion to modify bond as a motion to modify injunction for purposes of Rule 1.610). The court should have made time available or should have assured that an alternate judge was assigned. The amounts at issue in this litigation are substantial, [footnote omitted] and a $1,500 bond was clearly inadequate.

While we reverse the orders setting the bond, the question is what remedy should be employed. If, in the present case, the injunction were to be kept in force, we would remand for an immediate evidentiary hearing. Since the injunction is being dissolved, there is no functional need for the setting of a new injunction bond. The question is how to proceed in light of the recent decision in *Parker*. In that case the court adopted the general rule that damages for the wrongful obtaining of an injunction will be limited to the amount of the injunction bond. 544 So.2d at 1020–22. Not surprisingly, plaintiffs now contend that any claim by SeaEscape that there was the wrongful obtaining of the injunction will be limited to the $1,500 amount set by the court below.

* * *

Finally, for the guidance of bench and bar, we note that plaintiffs should not have sought *ex parte* relief in this case. A temporary injunction without notice is an extraordinary remedy and should be granted sparingly. *State v. Beeler*, 530 So.2d 932, 933 (Fla.1988); *Shouman v. American Express Travel Related Services Co.*, 566 So.2d 875 (Fla. 3d DCA 1990). In the present case there had been ongoing negotiations between the parties with respect to this dispute. SeaEscape gave notice of termination on May 10, 1990. Plaintiffs did not invoke arbitration or seek the injunction until one month later, at which time one week remained before Maximum's termination date. [Footnote omitted]

Even assuming this was otherwise a proper injunction case, plaintiffs were clearly not exposed to "immediate and irreparable injury, loss or damage ... before the adverse party can be heard in opposition," Fla.R.Civ.P. 1.610(a)(1)(A), which is the applicable standard. *See Shouman*, 566 So.2d at 876.

The temporary injunction is dissolved, effective immediately upon the filing of this opinion. While we do not prohibit the filing of a motion for rehearing, no such motion will delay the dissolution of the injunction, which is immediate. The orders setting bond are reversed, and the appeal of the order on motion for sanctions is dismissed. [Footnote omitted]

CMM Approach: Note that the court in the *Seaescape* case relies on a foundational legal maxim never to be forgotten: courts only turn to consideration of *equitable remedies where there is no adequate remedy at law*. Practitioners typically pray for legal and equitable damages in the alternative, and in the discovery and pre-trial process will whittle down the potential remedies that apply. A danger is that failure to cast one's net wide enough at the beginning of litigation may lead to an *election of remedy*. At some point, aspiring lawyers should learn the different requirements of *temporary* injunctions in comparison to *permanent* ones.

MONTANER v. BIG SHOW PRODUCTIONS, S.A.

District Court of Appeal of Florida, Third District, 1993

620 So. 2d 246

JORGENSON, Judge.

Hector Eduardo Reglero Montaner, p/k/a Ricardo Montaner, and Carlos Mameri appeal from an order entering a temporary injunction precluding Montaner and Mameri from appearing or performing in any musical activity and from interfering with Big Show Productions' and Love Records' managing and recording rights. For the following reason, we reverse with directions to dissolve the temporary injunction immediately. [Footnote omitted]

Ricardo Montaner is a Venezuelan singer and recording artist. Carlos Mameri is his personal manager. In 1986 Montaner entered into a managing contract with Big Show Productions and into a recording contract with Love Records. Both corporations were organized under Venezuelan law. In early 1992, Big Show and Love Records commenced an ex parte action in a Venezuelan court seeking to enjoin Montaner from engaging in activities in breach of the management and the recording contracts. On April 1, 1992, a Venezuelan court entered an order enjoining Montaner from breaching the contracts. Such orders are known in Venezuela as "Amparo." Big Show and Love Records allege that Montaner was summoned by a notice published in a Venezuelan newspaper on June 2, 1992. Pursuant to Venezuelan procedural law, the "Amparo" was automatically reviewed by a superior court, and the superior court affirmed the "Amparo."

Montaner alleges he did not learn about the "Amparo" until early March of 1993. On April 29, 1993 Montaner filed a complaint in Venezuela against Big Show and Love Records seeking damages and a declaration of rights under the contracts. The action is pending in a Venezuelan court. The next day Big Show, Love Records, and Rodven, Inc., a Florida corporation acting as the exclusive licensee of Big Show and Love Records, filed a complaint in Dade County seeking (1) domestication and enforcement of the "Amparo"; (2) injunctive relief; (3) and damages for tortious interference with a business relationship. Big Show, Love Records, and Rodven filed an *ex parte* motion for temporary injunction seeking to enjoin Montaner and Mameri from engaging in activities related to Montaner's singing career. The court entered the temporary injunction. The trial court then denied Montaner's and Mameri's Emergency Motion to Dissolve Temporary Injunction.

The temporary injunction compels Montaner to perform his management and recording contracts. Contracts for employment or personal services should not be enforced by injunction or specific performance. *Seaescape, Ltd. v. Maximum Marketing Exposure*, 568 So.2d 952, 954 (Fla. 3d DCA 1990); *Shearson Lehman Hutton, Inc. v. Meyer*, 561 So.2d 1331, 1332 (Fla. 5th DCA 1990); *Mosely v. De Moya*, 497 So.2d 696, 697–98 (Fla. 3d DCA 1986). The appropriate remedy is an action for damages for breach of contract. *Id.* An injunction to prevent the breach of a personal service contract is not available. *Robinson v. Sax*, 115 So.2d 438, 440 (Fla. 3d DCA 1959) ("[I]f the subject matter of the proceeding is a personal service contract, no equitable remedy is available, either specific performance or injunction against threatened breach."). The temporary injunction against Montaner and Mameri should not have been granted.

Moreover, a foreign judgment will not be recognized and enforced by a Florida court unless jurisdictional and due process standards required by Florida law are observed in the foreign proceeding. *Ogden v. Ogden*, 159 Fla. 604, 33 So.2d 870 (1947*); Parker v. Parker*, 155 Fla. 635, 21 So.2d 141 (Fla.),

cert. denied, 326 U.S. 718, 66 S.Ct. 23, 90 50.Ed. 425 (1945); *Jackson v. Stelco Employees' Credit Union Ltd.*, 203 So.2d 669 (Fla. 4th DCA 1967). In *Parker*, the supreme court refused to recognize a divorce decree issued in Cuba because the wife's due process rights were violated by the Cuban court. *Parker*, 155 Fla. at 637, 21 So.2d at 142. The husband falsely alleged in the Cuban court that he did not know the wife's domicile and then served her by publication. The wife received no notice of the divorce proceedings. The supreme court held that "the judgment of a foreign country ... [should] not be recognized unless [an] opportunity ... [is] given for a fair trial after service or voluntary appearance of the defendant." *Id.*

Montaner received inadequate notice of the action against him. Not only was the alleged notice given two months after the "Amparo," but the notice was by publication which was not sufficient under Florida's due process rights. *See Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So.2d 1225, 1227 (Fla.1986). We reverse the order with directions to dissolve the injunction immediately. [Footnote omitted]

Reversed with directions to dissolve the injunction immediately.

Notes

27. The immediately preceding case involves a business entity as the original claimant whose favorable judgment was appealed. The designation "S.A." is from the Spanish "sociedad anonima," or "anonymous society." Like its French cousin "societe anonyme," the term designates a licensed business entity with limited liability and a name different from the holders of its shares or participation interests. The U.S. "LLC" and other "joint stock" companies including "Corp." are similar, U.S. forms. For a history and discussion of the limited-liabilty corporate form, *see, e.g.,* M. Petrin, *Reconceptualizing the Theory of the Firm – From Nature to Function*, 118 PENN ST. 50. REV. 1 (2013).

28. There is an interesting side issue in the *Montaner* case: enforcement of foreign judgments. There are some general rules on how to go about seeking enforcement of a decision by a foreign court of arbitral tribunal (*See, e.g.*, FLA. STAT § 55.501 *et. seq*. (2017) (Florida Enforcement of Foreign Judgments Act)).

C. Court-Ordered Monetary Compensation (Quasi Contract & Accounting)

(1). Mechanics of the *Quantum Meruit* Doctrine

Sometimes parties discuss a contractual relationship but do not follow through with all of its formalities. Thus, negotiations may be demonstrated, but the parties did not establish the four main elements of contract formation (Chapters I-V), or failed to include a necessary term (*see* introductory paragraphs to Chapter XIII), or there is a problem of enforcing a contract where one of the parties qualifies to use a defense to enforcement (Chapters XXIV – XXIV). Nevertheless, valuable work may have been done, or materials may have been supplied that cannot be returned. This would leave one party with a windfall, which runs counter to the purpose behind contractual remedies. If there were a contract, and it was breached, a party could ask for the return of benefits conveyed upon the other party that were not merited. Another way to describe the same idea is that while a contractual party is entitled to compensation for breach, such party should not be *unjustly enriched*. In the case of breach, return of unearned or unwarranted benefit is by *restitution* (*see* Chapter IX).

The same premise is true even where no contract exists, in cases where a contract should be implied. Where a *quasi contract* (also known as *implied contract* or *constructive contract)* is found, *quantum meruit* acts to disgorge unwarranted benefits to be returned to the right party. Stated another way, what *restitution* permits in the case of breached contracts, *quantum meruit* permits in cases of *quasi contracts.* The two are in fact mutually exclusive.

CROSS v. STRADER CONST. CORP.

District Court of Appeal of Florida, Second District, 2000

768 So. 2d 465

WHATLEY, Acting Chief Judge.
David and Peggy Cross appeal an order granting Strader Construction Corporation's motion for enforcement of a judgment lien. We conclude that the homestead exemption precluded the enforcement of the judgment lien and reverse.

The Crosses hired Strader as a general contractor to construct their home. Problems arose and litigation followed. Strader sued under three causes of action: enforcement of a mechanic's lien, breach of contract, and quantum meruit. The Crosses counterclaimed for breach of contract. The trial court denied all claims except Strader's quantum meruit claim. Pursuant to that cause of action, the trial court entered a final judgment awarding Strader $28,011 in damages. Strader then filed a motion to enforce the judgment lien and authorize the sale of the property, which the trial court granted. The Crosses argue that the trial court erred in granting the motion because the property is their homestead. Both parties acknowledge the homestead nature of the property.

The issue is whether Article X, Section 4(a) of the Constitution of the State of Florida protects the Crosses' real property from this judgment lien. Article X, Section 4(a) states in relevant part:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty....
> (emphasis added).

Strader contends levy and sale are appropriate as the judgment was for goods, labor, and materials that were incorporated into the improvement of the Crosses' property. Strader would be correct if he had prevailed on his mechanic's lien claim or his breach of contract claim. *See In re Clements*, 194 B.R. 923 (Bankr.M.D.Fla.1996); *Brinson v. Creative Aluminum Prod., Inc.*, 519 So.2d 59 (Fla. 2d DCA 1988). However, the trial court denied both of these claims and the final judgment was not appealed.

Article X, Section 4(a) expressly provides that obligations for the purchase, improvement, or repair of the property, which are contracted for, are an exception to the homestead exemption. Florida law requires a strict construction of the exceptions to the homestead exemption. *See Butterworth v. Caggiano*, 605 So.2d 56 (Fla.1992). Quantum meruit is the antithesis of matters contracted for. Quantum meruit damages cannot be awarded when an enforceable contract exists. *See Corn v. Greco*, 694 So.2d 833 (Fla. 2d DCA 1997). As stated in *First Data Resources, Inc. v. Safecard Services, Inc.*, 574 So.2d 311 (Fla. 3d DCA 1991), “breach of contract and quantum meruit are mutually exclusive remedies.” We conclude that the judgment for quantum meruit damages in this case does not fall within the exceptions to the homestead exemption. Accordingly, Strader's monetary judgment is not enforceable against the Cross property so long as it maintains its homestead status.

This cause is reversed and remanded for proceedings consistent with this opinion.

GREEN, J., Concurs.

DAVIS, J., Dissents with opinion.

DAVIS, Judge, Dissenting.

I respectfully dissent. The majority concludes that a judgment lien based on a quasi contract does not defeat homestead protection because it, by definition,

is not a contract. In so holding, the majority strictly construes the language in article X, section 4(a) of the Florida Constitution, which provides:

There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property....

That is, the majority would require the existence of a legally enforceable contract before a person could enforce a judgment lien under this exception.

I would reject such a literal interpretation of the Florida Constitution. Rather, I read the phrase "contracted for" as a description of the relationship between parties, and not a delineation of a sole theory of recovery. It appears the trial court's use of the term "quantum meruit" was inartful. *See Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co.*, 695 So.2d 383, 386 (Fla. 4th DCA 1997). However, I find no fault with its ruling that, even though no enforceable contract existed, the facts warranted a finding that the parties' relationship was quasi contractual in nature. That is, the Crosses invited Strader to perform the improvements, Strader expected to be paid, and the Crosses anticipated paying for the improvements. Accordingly, I would read the constitutional language to afford Strader the benefit of the exception.

I do not believe such a reading violates the intent of the constitutional provision. Notwithstanding the inartful and interchangeable use of such terms as "quantum meruit," "quasi contract," and "unjust enrichment" by Florida courts, these courts have frequently allowed an equitable lien to defeat the homestead protection to prevent unjust enrichment. See id. "[W]here equity demands it [the Florida Supreme Court] has not hesitated to permit equitable liens to be imposed on homesteads beyond the literal language of article X, section 4*." Palm Beach Sav. & Loan v. Fishbein*, 619 So.2d 267, 270 (Fla.1993); *La Mar v. Lechlider*, 135 Fla. 703, 711, 185 So. 833, 836 (1939) (equitable lien available to prevent unjust enrichment even in the absence of fraud or malfeasance by beneficiary of homestead protection). Although the judgment lien herein may not technically be an "equitable" lien, see Commerce Partnership, 695 So.2d at 390, I would give a broader reading to article X, section 4(a) than the majority, and affirm the trial court's enforcement of the final judgment.

Note

The *Cross* case involves a potential contract for construction of a home, which in turn involves an important, and oft-bar-tested, constitutional right of

homeowners to have their primary residences free from attachment with the exception of debts that directly improve the property itself. The prohibition on attachment by creditors on a qualifying homestead excludes things like mortgage loans (to buy the property), property taxes (to maintain the property), and improvement liens (security for payment of home improvements to maintain the value of the property). An example of a debt that could not attach to a qualifying homestead would be a credit card debt. In broad strokes, the Florida Constitution protects from all creditors whose debts do not directly secure or improve residential property as a way to ensure that the citizenry of Florida have a roof over their heads.

(2). Valuation of the *Quantum Meruit* Remedy

SOLUTEC CORP. v. YOUNG & LAWRENCE ASSOCIATES, INC.

District Court of Appeal of Florida, Fourth District, 1971

243 So. 2d 605

OWEN, Judge.
Appellant was defendant who suffered an adverse judgment following a jury trial in an action for quantum meruit. Reversible error has not been shown and we therefore affirm the judgment.

Defendant is an embryo corporation possessing patents for certain technical equipment which it proposed to manufacture and market. Lacking any sales organization or marketing know-how, defendant employed the plaintiff corporation as a marketing consultant and its national sales representative. The technical nature of the product involved required the plaintiff to perform various services such as preparing technical manuals for the sales force, technical training for salesmen, outlining an advertising and promotion program, and consulting with the defendant on production schedules and prices. These services commenced in late 1966 and continued through December, 1967, at which time they were terminated. The parties never reached an agreement as to the compensation the plaintiff would receive for such services. When the plaintiff was originally employed, its president, Mr. Young, submitted in writing an offer to perform these various services for a fixed retainer of $5,500, plus 20% Commission on gross sales. This written offer in the form of a letter dated September 8, 1966, was never accepted. Despite the plaintiff's efforts no sales resulted up to the time the services were terminated in December, 1967, nor had the defendant paid plaintiff any compensation for the services performed.

The suit as originally filed was in two counts, the first alleging an express oral agreement as outlined in Mr. Young's written offer of September 8, 1966, and the second count seeking recovery on a theory of quantum meruit for the

reasonable value of the services furnished. Defendant's answer denied that there was an express agreement between the parties and at trial, plaintiff abandoned Count One proceeding to trial solely on the theory of quantum meruit. Evidence offered by the plaintiff included testimony as to the nature and extent of the services performed, and opinion testimony as to the reasonable value of such services. The jury verdict was within the range of such opinion testimony.

Appellant's first point is that in a suit based on quantum meruit, the plaintiff cannot recover compensation which is not reasonably implied by the circumstances to have been agreed upon by the parties. The point presents a contradiction in itself and is without merit. Any proof of an express agreement between the parties as to the compensation to be paid for the services rendered would defeat rather than sustain an action based upon quantum meruit which is, of course, one of the common counts under the form of action historically known as general assumpsit. The court's opinion in the case of *Hazen v. Cobb*, 1928, 96 Fla. 151, 117 So. 853 contains a scholarly discussion of the historical difference between general assumpsit and special assumpsit and supports the view that the law will not imply a contract where a valid express contract exists*. See also Bloom v. Frese*, Fla.App.1960, 123 So.2d 47.

Appellant also contends that in a suit for damages based on quantum meruit, it is error to permit the case to go to the jury in the absence of any evidence of value to the defendant. The measure of recovery in a case of this type is the reasonable value of the labor performed and the market value of any materials furnished, and not the value to the defendant that the completed project represents. *Moore v. Spanish River Land Co.*, 1935, 118 Fla. 549, 159 So. 673.

Plaintiff called as a rebuttal witness its president, Mr. Young, who testified that his company would not have been willing to perform the marketing services (as opposed to sales representation) for compensation limited only to commission on sales. By way of attempted impeachment the defendant offered in evidence a copy of the written proposal submitted by Mr. Young under date of September 8, 1966. Appellant contends that the court's refusal to allow such document in evidence was harmful and prejudicial error. It is clear that the document could not have been offered as evidence of an express agreement between the parties as to the manner of compensation because all of the evidence established that the defendant never accepted such proposal. Our examination of the document satisfies us that it is not contradictory of Mr. Young's rebuttal testimony and hence the court did not abuse its discretion in rejecting the proffered impeaching testimony. *Winner v. Sharp*, Fla.1949, 43 So.2d 634.

Appellant's final point is directed toward the court's denial of defendant's request that the jury be admonished to disregard certain argument of plaintiff's counsel alleged to be imflammatory and based on matters not supported by the record. In examining the record, we find not only that the court did in each instance admonish the jury to base its verdict solely on the evidence in the case, but also that the argument of counsel was not such as could fairly be said to be prejudicial or inflammatory. *Cf. H. 1. Holding Co. v. Dade County*, Fla.App.1961, 129 So.2d 693.

The judgment is affirmed.

Affirmed.

WALDEN and REED, JJ., concur.

(3). Accounting

SODIKOFF v. ALLEN PARKER CO.

District Court of Appeal of Florida, Third District, 1967

202 So. 2d 4

PEARSON, Judge.

The appellants were the plaintiffs in the circuit court where they brought a suit in equity for an accounting and other relief. The cause was assigned to the division of the Honorable Pat Cannon, who heard all motions and conducted all proceedings, through and including three days of trial. The chancellor, at the conclusion of the trial, directed respective counsel to file written closing arguments and submit copies of proposed final decrees. The chancellor died in office prior to the date scheduled for submission of the written closing arguments and proposed final decrees. The parties stipulated: 'That the Honorable Raymond G. Nathan, circuit judge and successor to the Honorable Pat Cannon, circuit judge, deceased, may continue to hear this case and enter a final decree on the basis of the record which was pending before Judge Cannon before his death.' The successor chancellor found: (1) that the three-year statute of limitation applied, and that plaintiffs did not bring their suit within three years after they discovered or could have discovered the alleged fraud; (2) that a general release which had been executed by appellants was a bar to the claim of appellants; (3) that inasmuch as the cause of action was predicated upon fraud, it was the burden of the appellants to prove their case by clear and convincing evidence, and that they had failed to do so. This appeal is from that decree.

The appellants present four points:

‘1. Did the successor chancellor misapprehend the nature of the proceedings and governing principles and maxims of equity in entering a final judgment at law in an equity accounting action?

‘2. Where affirmative defenses of bar and estoppel by statute of limitations, laches, and release, had been twice raised, heard and rejected by the chancellor who proceeded in the equity action through full trial on the merits and died in office before entering final decree, may his successor, upon the completed and unchanged record, overrule and reverse such rulings by applying such affirmative defenses in entry of final judgment dismissing the action?

‘3. Did the successor chancellor misapprehend the evidence in denying recovery where the manifest weight of the evidence established a minimum indebtedness of defendant to plaintiffs in the sum of $100,000.00?

‘4. Do the facts and circumstances apparent (on) the face of the record on this appeal reflect a substantial departure from the essential requirements of law and a resulting injustice to the litigant plaintiffs?’

The gist of appellants' argument under their point I is that the chancellor must have misapprehended the nature of the proceedings because the decree appealed was erroneously labelled ‘final judgment’ and in the style of the cause preceding the final decree, the cause was erroneously styled ‘at law’. In addition, it is alleged that the chancellor misconceived the nature of the proceedings when he applied a statute of limitation rather than the equitable doctrine of laches. We believe that an examination of the final decree [Footnote omitted] effectively refutes appellants' inferences from the terminology employed. The decree is a well written and lengthy discussion of the case, containing the court's findings of fact and his conclusions therefrom. It evidences an earnest effort to comply with the difficult task which had been imposed upon the successor chancellor by the stipulation of the parties.

It has often been stated that there are no magic words in the practice of law under the Florida Rules of Civil Procedure. See Florida Civil Practice Before Trial, Pleadings s 12.16; *Chasin v. Richey*, Fla.1957, 91 So.2d 811. A pleading will be considered what it is in substance, even though mislabelled. Therefore, the use of the words ‘final judgment’ and ‘at law’ do not indicate a misapprehension by the chancellor of the principles of equity involved in his decision.

An action for accounting was formerly cognizable, both at law and in equity. *Campbell v. Knight*, 92 Fla. 246, 109 So. 577 (1926). The basis for the equity jurisdiction in accounting matters was the complexity of the issues and the

fact that there were often numerous issues which made the use of a common law jury impracticable. See Jurisdictional Prerequisites for an Equitable Accounting, 6 U.Fla.Rev. 232. The statute of limitations is applicable to the individual allegations for an accounting. *See Stringer v. Dortch*, 136 Fla. 567, 188 So. 590 (1939); *H.K.50. Realty Corporation v. Kirtley*, Fla.1954, 74 So.2d 876; *Wall v. Johnson*, Fla.1955, 78 So.2d 371. It therefore was proper for the trial judge to use terminology relative to the statute and to test the appellants' cause of action by this standard.

Appellants' second point quoted above raises essentially the question of the power of a successor chancellor to decide the cause upon the basis of the defenses tendered. Appellants rely upon the rule stated in *Groover v. Walker*, Fla.1956, 88 So.2d 312*. See also Lawyers Co-operative Pub. Co. v. Williams*, 149 Fla. 390, 5 So.2d 871 (1942); and *Olin's Inc. v. Rader*, Fla.App.1964, 161 So.2d 711. The rule cited, which is to the effect that a successor judge may not review, modify or reverse upon the merits on the same facts the final orders of his predecessor, is not applicable here.

It is immediately apparent that no final order was entered by the predecessor. A brief review of the history of the case is necessary in the discussion of this point. Prior to the filing of the answer to the complaint, the appellants, as plaintiffs, moved for ‘entry of an interlocutory decree that plaintiffs are entitled to an accounting and ordering defendant to render detailed accounting.’ Upon the basis of this motion, the court entered an interlocutory order in which it appointed an auditor to examine defendant's books and an auditor to examine plaintiffs' books and directed the parties to submit to said examination. An answer was thereafter filed by the defendants in which the affirmative defenses mentioned were set forth. After the filing of the answer, the defendants moved for a summary decree. After hearing, the court denied defendants' motion for summary final decree.

On the basis of this situation, it is urged by appellants that the original chancellor twice passed upon the sufficiency of the affirmative defenses and found that they were inadequate. It should be noted that the defenses were not stricken by order nor was their sufficiency attacked. The interlocutory order directing that the parties submit to an examination of their books and papers, although entitled ‘interlocutory decree’, cannot be interpreted as a final order by the court that the affirmative defenses would not be further considered upon their merits. There is no language to this effect in the order. The defenses had not yet been filed but it is obvious that the chancellor expected these defenses to be filed since they were included in appellee's answer to the motion for entry of interlocutory decree. We are reinforced in our conclusion on this point by the fact that extensive evidence upon these defenses was taken at the trial of the cause. Even if the issues had not existed, the parties tried the issues of the affirmative defenses at the trial which took place after the entry of the interlocutory decree.

Appellants' point urging that in denying defendant's motion for summary final decree, the original chancellor passed upon the merits of the affirmative defenses is also untenable. The basis for the denial of a motion for summary decree is clearly whether there is a genuine issue of material fact on any of the defenses, not the ultimate merit of these defenses.

Appellants' third point is directed to the manifest weight of the evidence. We find that the chancellor has adequately discussed the weight of the evidence in his final decree. We respectfully adopt the following portions thereof:

‘The evidence offered by the Plaintiffs in support of their claim was mainly based upon a summary introduced through their witness COLLINS. This witness testified that he had taken all of the transactions between the parties, as reflected by the books and records of the Defendant, and has computed the reserve, to which the Plaintiffs were entitled, to be 20% of each of such accounts. COLLINS and the Plaintiff, MAURICE SODIKOFF, testified that Plaintiffs were entitled to 20% since that was the ‘going rate.’ The Defendant offered testimony to the effect that the reserve rates were much lower than 20%. In rebuttal, the Plaintiffs introduced several witnesses who also testified that the going rate for reserves was much lower than 20%.

‘The cause of action of the Plaintiffs is predicated on fraud and it was the burden of the Plaintiffs to prove their case by clear and convincing evidence. The Plaintiffs own testimony was not clear as to his transactions with Defendant. The state of confusion created by conflict between the plaintiffs' own witnesses as to the percentage factor to be applied in computing reserve accounts, was neither clear nor convincing, since a doubt is left from all the testimony as to just what was the proper percentage factor.’

The chancellor's conclusion, that the plaintiff had not adequately established his cause of action, is supported by the record.

Appellant's fourth point is a recapitulation of the arguments advanced under points, I, II and III, and we think that it fails to present reversible error.

The decree of the chancellor rests upon three separate grounds as was set out above. We have not discussed the issue of the general release. A review of the record demonstrates that the chancellor's finding ‘There is no evidence in this record which would constitute a basis for setting aside the effect of the release’ is fully substantiated by the record before us. The release is in good form and presumptively correct. In the absence of any evidence as to its illegality, it in itself was a sufficient basis for the decision of the chancellor.

Affirmed.

(4). Constructive Trusts

Constructive trusts (sometimes also referred to as *equitable liens*) are very often used in cases of family law. *See, e.g. Wadlington v. Edwards*, 92 So.2d 629 (Sup. Ct. Fla. 1957); *Castetter v. Henderson*, 113 So.3d 153 (Ct. App 4th Dist. 2013). They are also used very often to hold interests in land that are equitable – such as to prevent current fee holders from dissipating the value of property to the detriment of those who have a future interest in the property, *see, e.g., Steinhardt v. Steinhardt*, 445 So.2d 345 (Dist. Ct. App. for 3d Dist. 1984), or for example when an agent takes an opportunity to purchase real estate that belongs to the principal. *See*, *e.g., Quinn v. Phipps*, 93 Fla. 805 (Sup. Ct. Fl. 1927) (the opinion and a concurring opinion by Justice Terrell comprehensively address constructive trusts). The agency or trust between business managers of companies and their shareholders may entitle shareholders, by constructive trust, to profits or business opportunities taken by managers that should have gone to the business and its shareholders. *See, e.g., Heina v. Chucua Paso Fino Horse Farm, Inc.*, 752 So.2d 630 (Dist. Ct. App for 5th Dist. 1999). Though it is not impossible to imagine a constructive trust in the case of contracting parties that does not involve some kind of agency, an award of equitable remedies through a constructive trust does not appear to be common.

DIAMOND "S" DEVELOPMENT CORP. v. MERCANTILE BANK

District Court of Appeal of Florida, Fifth District, 2008

989 So. 2d 696

PER CURIAM.

In these consolidated appeals, appellants seek review of final judgments entered against them for unjust enrichment. Florida courts have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter. *Ocean Commc'ns, Inc. v. Bubeck*, 956 So.2d 1222, 1225 (Fla. 4th DCA 2007); *Kovtan v. Frederiksen*, 449 So.2d 1 (Fla. 2d DCA 1984*). Accord Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 899 So.2d 1222, 1227 (Fla. 1st DCA 2005). We agree that appellee's unjust enrichment claim was precluded by the existence of an express contract between the parties concerning the same subject matter. For the first time on appeal, appellee asserts that even if the unjust enrichment claim fails as a matter of law, the judgments for appellee should be affirmed under a "constructive trust theory of recovery." However,

a constructive trust is not a traditional cause of action, but an equitable remedy that must be based upon an established cause of action. *Collinson v. Miller*, 903 So.2d 221, 228 (Fla. 2d DCA 2005). Because appellee cannot advance the theory of unjust enrichment for recovery, it has no constructive trust remedy. Accordingly, we reverse the judgments against appellants for unjust enrichment and remand with directions that the trial court enter judgments for appellants on that claim.

REVERSED and REMANDED with directions.

WEBSTER, VAN NORTWICK, and THOMAS, JJ., concur.

Problem 12-2

Alfred died, leaving a life estate in a large parcel of land to his beloved spouse Mary and the remainder, in fee simple absolute, to his alma mater as a charitable donation. Desiring to move out of state, Mary sold the land to a neighbor who wanted it for hunting purposes. Title had already transferred to the neighbor. What can the alma mater do with regard to its future interest?

D. Other Equitable Remedies

Where one party engages in improper conduct, such party may be denied rights that would otherwise accrue, such as an argument that a contract had not yet been formed, or that it was unenforceable for some reason (e.g., not in writing when it should be (*see* Chapter XIII), outside the statute of limitations period for contracts actions, etc.).

(1). Equitable Estoppel Based on Reliance

This is the same concept of *promissory estoppel* addressed in Chapter 7. You may recall that, uniquely, this cause of action may be asserted affirmatively. Other forms of equitable estoppel are posited as defenses to prevent another's argument and are not asserted as affirmative claims. Thought of another way, in some cases a damaged party can *bring* a lawsuit seeking redress. Usually, however, in the case of equitable remedies, a party can only use them in response to an affirmative argument. This concept is further considered below. You may pick up more in an Equity and Remedies course. However, examples may prove helpful. As per the below, if someone "sets you up" by having you think that there is agreement on something when there is not, by way of a promise, one can argue for redress as plaintiff. Other equitable defenses include things such as *laches*, which is used when another is making a claim against someone else. The "someone else" may argue that, under the facts and circumstances, the claimant waited too long and it is not fair to allow the claim. This concept is further considered below.

GULF CITIES GAS CORP. v. TANGELO PARK SERVICE CO.

District Court of Appeal of Florida, Fourth District, 1971

253 So. 2d 744

REED, Chief Judge.
This is an appeal from a final judgment of the Circuit Court for Orange County, Florida. Broadly stated, the issue on this appeal is whether or not the trial court's final judgment correctly applied the terms of a written contract between the plaintiff, Tangelo Park Service Company, and the defendant Fuel Gas Corporation (hereafter called ‘Fuel Gas').

The plaintiff, Tangelo Park Service Company, filed an amended complaint on 11 October 1968 which alleged that the defendants Fuel Gas and Gulf Cities Gas Corporation (hereafter called ‘Gulf Cities') breached the contract with plaintiff by failing to pay the plaintiff ten percent of all monies collected for gas sold by said defendants in Tangelo Park, a subdivision in Orange County, Florida, from 1 May 1966. The complaint was later amended to add Florida Gas Company (hereafter called ‘Florida Gas') as a party defendant based on the allegation that Florida Gas assumed the obligations of the contract. The relief sought was an accounting and a judgment for the asserted indebtedness. The cause was tried without a jury.

In essence the contract purported to give the defendant Fuel Gas the exclusive right to sell gas to residents of Tangelo Park Subdivision for cooking and heating. In return Fuel Gas was obligated to pay Tangelo Park Service Company ten percent of all revenues collected by it arising from such sales. For our purposes the critical provisions of the contract state:

> ‘5:-If a consumer refuses to use a gas range, an electric range may be used but the same shall not be furnished by builder or original seller of the home, or any person acting for builder or original seller. It is further understood that consumers shall not be required to use gas for cooking, water heating, or space heating, but if gas is used for any of the foregoing purposes it shall be gas furnished by SUPPLIER,* and the exclusive right to provide such service shall be arranged by SERVICE COMPANY* to extend for as long as the law and government authorities will permit. SERVICE COMPANY will arrange for reasonable enforcement provisions, but SUPPLIER shall have the right and duty of enforcing exclusive gas service rights.

> ‘12:-(a) SUPPLIER WILL pay to TANGELO PARK SERVICE COMPANY not later than fifteen days following the end of each calendar quarter (payment dates-April 15, July 15, October 15, and January 15), an amount equal to ten per cent (10%) Of the gross amount received by SUPPLIER, through the sale of gas, from consumers within the Subdivision using the service provided by SUPPLIER.’ (Emphasis added.)

The defendant Gulf Cities was not a signatory to the contract.

* * *

Al Feldman testified that he negotiated the terms of the contract with the principals of defendants Gulf Cities and Fuel Gas. He said that some negotiations were held with a Mr. Birnbaum who represented himself as negotiating for Gulf Cities. Birnbaum, according to Feldman, stated that Fuel Gas was the parent of Gulf Cities, and for image purposes the contract would be in the name of Fuel Gas. With respect to the duration of the contract, Feldman testified, ‘I think the contract speaks for itself, it was a-forever.’

* * *

The trial judge sitting without a jury was presented with two basic issues. The first was whether or not the defendant Gulf Cities was liable on the contract between Fuel Gas and the plaintiff, Tangelo Park Service Company, even though Gulf Cities was not a formal party to the contract. *** The trial judge held that the defendant Gulf Cities was liable as a party to the contract and ordered it to pay the plaintiff ten percent of all monies collected By either defendant Gulf Cities or Florida Gas from the sale of gas in Tangelo Park through 27 September 1970.

As to the first issue, the trial court's ruling is amply supported by the facts and the law. Where a party acts in such a way as to lead others reasonably to change position on the assumption that the party has adopted another's contract as his own, the party so acting is estopped to disclaim his apparent position as a party to the contract. *See Ayala v. Murrell*, Fla.1957, 97 So.2d 13 and *Manatee County Growers' Ass'n v. Florida Power & Light Company*, 1934, 113 Fla. 449, 152 So. 181. This principle clearly applies to the undisputed facts in this case, and for purposes of this opinion defendant Gulf Cities will be treated as an original party to the contract sued on.

* * *

For the foregoing reasons the final judgment is reversed and the cause remanded for a redetermination of the issue of the amount of damages only, in

accordance with views hereinabove set forth. The trial court may receive such further evidence as it may be advised to accomplish the purpose of the remand.

Reversed and remanded.

OWEN and MAGER, JJ., concur.

(2). Equitable Estoppel is a Defense, Not a Claim

MEYER v. MEYER

District Court of Appeal of Florida, Second District, 2009

25 So. 3d 39

KELLY, Judge.

In this appeal from a final judgment, Daron Meyer challenges the order dismissing his claims for specific performance of a contract, the summary judgment dismissing his claim for equitable estoppel, and the denial of his motion for new trial. We reverse and remand for a new trial.

Victor Meyer, Daron's father, owned and operated a tropical fish farm in Hillsborough County. According to Daron, his father expressed an interest in selling the business to him. Daron prepared a contract to buy the business and presented it to his father. He quit his job to operate the fish farm, began making monthly payments toward the purchase price, and assumed responsibility for the financial obligations of the business. In return, he expected his father to execute a quitclaim deed as required by the contract. Ultimately, Victor refused to do so.
Daron filed suit for breach of contract and specific performance. Victor moved to dismiss the claims for specific performance arguing they were barred by the statute of limitations. The trial court agreed and dismissed the specific performance counts in the initial and the amended complaints. Daron filed a third amended complaint again alleging claims for breach of contract and specific performance; however, in the specific performance counts, he alleged that Victor made “promises and misrepresentations” to induce him to forego instituting legal action. He also included a count titled “equitable estoppel” in which he alleged that he had relied on “promises and misrepresentations” to his detriment.

Victor again moved to dismiss the specific performance counts based on the statute of limitations and the claim for equitable estoppel based on the failure to state a cause of action. At the hearing on the motion to dismiss, Daron admitted that the one-year statute of limitations for specific performance had

run, but he argued that the doctrine of equitable estoppel precluded his father from asserting it as a defense to the claims of specific performance. Citing the tolling statute, section 95.051, Florida Statutes (2005), the trial court dismissed those claims with prejudice because equitable estoppel was not one of the statutorily authorized grounds for tolling a limitation period. Victor then moved for summary judgment on the equitable estoppel count arguing that it was an affirmative defense, not a cause of action. The trial court agreed and dismissed the equitable estoppel count for failure to state a cause of action.

The case proceeded to trial on Daron's breach of contract claims.[Footnote omitted] Although the jury found that Daron and Victor had a valid written contract and that Victor had breached the contract, it awarded zero damages. Daron moved for a new trial arguing that the verdict was against the manifest weight of the evidence and was inadequate as a matter of law. The trial court denied the motion, and this appeal followed.

Daron first contends the trial court erred when it rejected his equitable estoppel defense and instead looked to the tolling statute to determine whether his claims for specific performance were barred by the statute of limitations. The doctrine of equitable estoppel acts as a bar to a statute of limitations defense. *Major League Baseball v. Morsani*, 790 So.2d 1071 (Fla.2001); *see also Fla. Dep't of Health & Rehabilitative Servs. v. S.A.P.*, 835 So.2d 1091, 1096 (Fla.2002) ("The preclusive effect of the statutes of limitation can be deflected by various legal theories, including the doctrine of equitable estoppel."). "Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct." *Morsani,* 790 So.2d at 1077. "Equitable estoppel ... does not 'toll' anything. By definition ... equitable estoppel 'estops' or bars a party from asserting something (e.g., a fact, a rule of law, or a defense) that he or she otherwise would be entitled to assert." *Id.* Its application is "wholly independent" of the statute of limitations and its tolling provisions. *See id*. at 1079-80. Thus, the trial court erred when it relied on the tolling statute to determine whether Daron's claims for specific performance were barred by the statute of limitations.

Victor nevertheless argues that we should affirm because Daron did not allege sufficient facts to raise a defense of equitable estoppel. "In some circumstances, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling." *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla.1999). We conclude that the record in this case will not permit us to affirm on this alternate basis. At the hearing on the motion to dismiss, Victor's counsel acknowledged that the allegations in the third amended complaint were probably adequate to raise an equitable estoppel defense. Because the adequacy of the allegations was not in issue,

Daron had no opportunity to argue they were adequate or, alternatively, to proffer additional facts. If we were to review the allegations now and affirm the trial court's dismissal, our decision would operate to deprive Daron of an opportunity to attempt to cure any alleged deficiencies. Under these circumstances we conclude that it is not appropriate to affirm on the basis suggested by Victor. *See Robertson v. State*, 829 So.2d 901, 908-09 (Fla.2002) (explaining that affirming based on an alternate ground that was not at issue in the trial court was improper where it operated to deprive a party of the opportunity to present evidence and argument on the matter). On remand, Victor may challenge the sufficiency of the allegations, and if the court finds they are deficient, Daron should have an opportunity to cure the deficiency.

Daron next contends that the trial court erred when it dismissed his claim for equitable estoppel. Relying in part on the same factual allegations he asserted in his claims for specific performance, Daron attempted to plead equitable estoppel as a cause of action. "In this state, equitable estoppel is a defensive doctrine rather than a cause of action." *Agency for Health Care Admin. v. MIED, Inc.*, 869 So.2d 13, 20 (Fla. 1st DCA 2004). "Florida has long recognized that '[e]quitable estoppel is not designed to aid a litigant in gaining something, but only in preventing a loss.' " Id. (*quoting Kerivan v. Fogal*, 156 Fla. 92, 22 So.2d 584, 586 (1945)). Because Daron's count for equitable estoppel was a claim for affirmative relief rather than an attempt to avoid potential defenses, the trial court correctly concluded that it failed to state a cause of action.

Finally, Daron contends he is entitled to a new trial on his breach of contract claim because the jury's zero verdict was inadequate. We agree. This court has previously noted that a zero verdict will be upheld if, based on the evidence, the jury could reasonably conclude that the plaintiff sustained no damages. *Sur. Mortgage, Inc. v. Equitable Mortgage Res., Inc.*, 534 So.2d 780 (Fla. 2d DCA 1988). On appeal, Victor has not been able to point to evidence that would have permitted the jury to award zero damages. Instead, he points to conflicting evidence regarding the value of the property and the business. While such conflicting evidence might have permitted the jury to choose between alternative damage figures, it does not justify an award of zero damages. Where a jury awards no damages despite uncontradicted evidence establishing more than nominal damages, the award is inadequate and must be reversed. *Id.*

Accordingly, we reverse the final judgment on Daron's claims for breach of contract and we remand for further proceedings consistent with this opinion. We affirm the final judgment on Victor's counterclaim.

Reversed in part, affirmed in part, and remanded.

CASANUEVA, C.J., and WALLACE, J., Concur.

E. U.C.C. Article 2 Equitable Remedies

The two remedies specifically provided for in U.C.C. Article 2, and therefore in state laws adopting it, are virtually the same as at common law, only more fact-specific (sale-of-goods situations). One was addressed above in the context of common law as *specific performance*, which would be a seller's action for the price. The other is the remedy of getting some item or thing from the other contractual party, and would be a buyer's right to goods that have not yet been tendered to the buyer. There are other special remedies provided for in state codes adopting U.C.C. Article 2, but are too specialized for a basic contracts course. (An example would be a very interesting seller's special right to reclaim shipped goods within ten days of their receipt by buyer upon learning of a buyer's insolvency, which ten-day limitation does not apply where a buyer has misrepresented its solvency in writing to the seller within three months of the delivery – *see* FLA. STAT. § 672.702(2) (2017)).

(1). Seller's Action for the Price

FLA. STAT. § 672.709. Action for the price. -

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price:

(a) Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price she or he must hold for the buyer any goods which have been identified to the contract and are still in her or his control except that if resale becomes possible the seller may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles her or him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (s. 672.610), a seller who is held not entitled to the price under this

section shall nevertheless be awarded damages for nonacceptance under the preceding section.

(2). Buyer's Right of Replevin

FLA. STAT. § 672.711. Buyer's right to specific performance or replevin. -

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort she or he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 12

40. Differences between legal remedies and equitable ones
41. Nature of each equitable remedy so as to know which ones may apply
42. Remedies for partial versus total breach; dependent versus independent covenants versus fraud as a basis for rescission
43. Interlocutory appeals, temporary injunctions, and injunctive relief

SUGGESTED EXERCISE(S)

(34) Have students map out the various equitable remedies, attributing to each their requirements and/or providing a proper example of when the grant of such remedy would be appropriate (where, of course, there is no adequate remedy at law).

(35) Have students, in small groups, create a short fact pattern potentially enabling a claimant to secure both legal and equitable damages (a case ‘on the fence’ between legal and equitable remedies).

Chapter 13: STATUTE OF FRAUDS

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As noted in Chapter I, there are distinct differences between the formation issues of Chapters I-VII and the defenses considered in Chapters XXIV – 26. As a refresher, problems arising from the first permit the parties to walk away from negotiations, often without any damages except perhaps for restitution of items that one side may have already provided to the other. Problems in the form of the latter would act as defenses to enforcement, and to the remedies such as rescission or reformation, which are equitable remedies discussed in Chapter 12. The two distinct subjects are sometimes confused. Formed

contracts for which there may be defenses to enforcement may be rescinded or reformed. By the way, contracts that are breach entitle the non-breaching party, and in at least one situation, even the non-breaching party, to contractual damages. (Think about it: if a breaching contractor pays full expectation damages, can it not take back the lumber and materials left at the work site?)

One of the most pervasive misconceptions in contract law involves the requirement of a writing. As noted elsewhere in Chapter XXIV, contracts do not necessarily need to be in writing. Thus, a writing in not an element of formation. However, the law has identified certain categories of contracts where fraud is so prevalent that they need to be in writing to be enforceable. There is in fact a difference between saying that a contract does not exist, on the one hand, and that the contract is not enforceable, on the other. Even non-lawyers have usually heard that contracts need to be in writing. Perhaps as a gentle admonition, discussion of the writing requirement is being addressed approximately half-way between coverage of formation issues (Chapters I-V) and the defenses to enforcement (Chapters XXIII-XXVI). The hope is that readers are made clear that the Statute of Frauds writing requirement is not a formation problem, but also that though it is addressed in a slightly illogical place, it highlights a common misconception about formation that will no longer confound as the reader discerns the reason for its strange location. Its true location in the logic of contract law is as one of the defenses, and more particularly, as something that could just as well be located in Chapter 24. Remembering not to forget to treat it where it really belongs begs the question whether it is a formation or an enforcement matter.

1. The Writing Requirement

As referenced in prior Chapters, and as explained in the Introduction to this Chapter, there are certain types of contracts that require a writing for a contract to be enforceable against the other party. Before exploring the types of contracts that require such a writing, this Section will cover what must be in a writing to satisfy the Statute of Frauds. First, and obviously, there must be a writing. However, the writing need not be a formal contract; informal writings may be sufficient and are defined as *any intentional reduction to tangible form*. Types of documents that meet this standard may include informal letters, a will, a telegram, a receipt, or even pleadings. Once a writing has been ascertained, generally, there are four main requirements that must be present in that writing: (1) signed by the party to be charged, (2) reasonably identifies the subject matter to the contract, (3) indicates that a contract has been made between the parties, and (4) includes the essential terms with reasonable certainty. (Certainly appears to be a factor in more than a few elements/rules). As readers may have realized after reading these requirements, each specific contract varies in the essential terms that may or

may not be needed in the writing. Those necessary contract-specific terms that must be present in the writing will be covered in the next Section's cases and Notes. However, there is one requirement that every Statue of Frauds writing has in common: it must be signed by the party to be charged, or stated another way, signed by the party against whom enforcement is sought.

At first glance, readers may assume that a full signature of the charged party is needed. However, the signature requirement may be met in a variety of ways. As defined by Restatement (Second) of Contracts § 134, "[t]he signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." So, this means that not only formal, full signatures meet this standard, but so do initials, an arbitrary code, thumbprint, or even letterhead. In addition to a handwritten signature in ink, the signature may be made in pencil, typed, printed, stamped, or impressed into the paper. Electronic signatures are not also *in vogue*.

With knowledge of the threshold requirements of a Statute of Frauds writing, the next Sections of this Chapter will examine the types of contracts that require such a writing.

2. Contracts That Require a Statute of Frauds Writing

A. Agreement Made Upon Consideration of Marriage

Note that cases typically involve not the marriage itself, but agreements on property and rights as marital partners negotiate the transfer or sharing of individual property as part of the marriage.

MILLER v. GREENE

Supreme Court of Florida, 1958

104 So. 2d 457

O'CONNELL, Justice.

Ethel Greenberg sued the defendant 1. Miller, appellant here, for monies due her by defendant. Defendant filed an answer and in addition filed a counterclaim in which he claimed plaintiff was indebted to him for services rendered in the reasonable amount of $25,000. Plaintiff moved to dismiss the

counterclaim on the ground that it stated ‘no claim upon which relief can be granted.’ On this motion the court dismissed the counterclaim with prejudice. In the order of dismissal the court did not assign reasons for dismissal. Defendant appeals from this order.

Plaintiff died during the course of the proceedings and the executors of her estate were substituted in her place.

In his counterclaim defendant related that he met plaintiff shortly after she acquired the ownership of a hotel on Miami Beach; that plaintiff had little experience in operating a hotel whereas he had such experience; that plaintiff requested defendant to participate in, advise, counsel and guide her in the operation of her hotel, which he did with the result that the hotel was operated profitably, and:

> ‘That in January, 1952, it having become apparent to the counterdefendant that as a result of the counterclaimant's efforts in her behalf as aforesaid, the Carlyle Hotel was being operated at a substantial profit, the counterdefendant promised the counterclaimant that, if the counterclaimant would continue to render services to her in the operation and management of the said hotel, as aforesaid, then she would marry him and she would share with him the net income resulting from the operation of the hotel, in the approximate amount of $25,000.00 to $30,000.00. That the counterclaimant agreed to render services as requested by counterdefendant and, in reliance on her said promise, continued to perform such services.’

The parties planned to wed in the fall of 1955 but the plaintiff became ill and the wedding was postponed. The defendant continued to render the services agreed upon and in the spring of 1956 the plaintiff informed him that her physical condition rendered marriage impossible for her. Plaintiff thereafter, in July of 1956, filed her complaint against defendant for monies due her.

On Appeal defendant presents two questions:

1. Whether or not the counterclaim contains allegations sufficient to state a cause of action.

2. Was it error to dismiss the counterclaim without leave to amend?

Consideration of the first question immediately presents the applicability of that portion of the Statute of Frauds, § 725.01, F.S.A., which reads:

> ‘No action shall be brought whereby * * * to charge any person upon any agreement made upon consideration of marriage * * *

> unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.'

Defendant argues that the promise alleged in his counterclaim is not within the Statute of Frauds because it was a promise made 'in contemplation of marriage' and not made 'upon consideration of marriage.' He contends that this is so because there was consideration for the alleged promise other than the marriage of the parties, 1. e., plaintiff's promise to share with him the income from the hotel, and that the promise of marriage was only incidental to the contract.

In opposition to this contention plaintiff argues that the sole, or at least the principal consideration for defendant's services was plaintiff's promise to marry him. Plaintiff asserts the rule to be that if the promise of marriage is in whole or in part the consideration for a contract the Statute of Frauds is applicable.

It is well settled that any verbal executory promise or agreement made in consideration of marriage, other than a mutual promise to marry, is embraced within the Statute of Frauds. Annotation, 1919, 10 A.L.R.. 321. There can be no question that this is the rule when a promise to marry is the sole consideration for an agreement. The purpose of this provision in the statute is to give protection against the consequences of rashness and folly by rendering hasty and inconsiderate oral promises, made to induce marriage, without legal force. See Herr v. Herr, 1953, 13 N.J. 79, 98 A.2d 55, 59.

In the case now before us the promise between the parties alleges consideration other than the promise of marriage by the plaintiff. We must therefore determine the rule to be followed in view of this added element.

Not having previously decided this question, we find ourselves in the position occupied by the Rhode Island court in the case of Hutnak v. Hutnak, 1951, 78 R.1. 231, 81 A.2d 278, 279, in that we must look to other jurisdictions and authorities for aid in answering the question.

We approve the following statement in the Hutnak case, reading as follows:

> '* * * (W)e have carefully examined the decisions of various courts as well as other pertinent authorities, and we find that the statute is generally given full force and effect where, despite other inducement, marriage is in whole or in part the real consideration for the agreement. Adams v. Adams, 17 Or. 247, 20 P. 633. 37 C.J.S. Fraud §§ 4, 5; 25 R.C.50. s 25, p. 451; 2 Williston on Contracts (Rev. ed.) §§485, 533; 1 Restatement, Contracts, § 192.

> See also Pound, Progress of the Law, 33 Harv.50.Rev. 933, 937. * * * The statute is no defense * * * if the marriage is not the real end or purpose of the agreement but a mere incident or condition thereof. * * *'

And as did the court in the Hutnak case, we find that the promise of marriage was not a mere incident or condition of the agreement, but rather was, at least in part, the real end or purpose of the agreement. The promise of marriage was certainly an essential element of the whole agreement. It can not be removed from the alleged agreement and leave remaining a contract expressive of the parties' intentions. The contract is not divisible.

Among the authorities which support the view we have adopted herein is 1 Restatement, Contracts, Sec. 192, wherein it is said that any contract for which marriage or a promise of marriage is the consideration, in whole or in part, is within the Statute. Also see 2 Corbin on Contracts, Sec. 426; 2 Williston on Contracts, Sec. 486 (Rev. ed. 1936) which says this rule applies in the case of indivisible contracts; Stevens v. Niblack's Adm'r, 1934, 256 Ky. 255, 75 S.W.2d 770; Terry v. Terry, 1936, 264 Ky. 625, 95 S.W.2d 282; Henry v. Henry, 1875, 27 Ohio St. 121; Rogers v. Joughin, 1929, 152 Wash. 448, 277 P. 988, which case recognizes no distinction between contracts made 'in contemplation' and those made 'in consideration' of marriage.

Also see 37 C.J.S. Frauds, Statute of § 230, which states that where one of the considerations for payment of money or transfer of property is a promise of marriage, the contract is within the Statute and the whole contract must fail, but that it is otherwise where the promise to marry is separable from the agreement to pay money or transfer property. Also see Davis v. Cox, 1912, 178 Ind. 486, 99 N.E. 803.

There are cases which appear to hold a contrary view. In Bader v. Hiscox, 1919, 188 Iowa 986, 174 N.W. 565, 10 A.L.R.. 316, the court said that if a promise be made upon a lawful and sufficient consideration, not within the statute, the promisor can not evade liability because there was another or additional consideration, proof of which is excluded by the statute. The court found the agreement to marry was a mere incident, and not the end to be attained or purpose to be accomplished.

The Bader case cited Larsen v. Johnson, 1890, 78 Wis. 300, 47 N.W. 615, as supporting it in principal. Defendant urges that the Larsen case illustrates the better view and should control this case. However, in the Larsen case the court found that the promise of marriage formed no part of the consideration for the agreement, and accordingly determined that the contract was in contemplation, not in consideration, of marriage. The Larsen case differs from the one now before us in the important fact that here it is clear that marriage

was a material part of the consideration for the alleged contract between the plaintiff and the defendant.

Defendant also contends that the fact that no marriage ever took place removes the agreement from the operation of the Statute. In support he cites Pomeroy on Contracts, Sec. 111 (3rd ed. 1926) which states that actual marriage itself is a necessary part of every agreement made upon consideration of it.

We can not agree with this contention.

As stated in 2 Corbin on Contracts, Sec. 463, marriage is not sufficient part performance to take a parol agreement therefor out of the Statute. This authority further states:

> 'It has been argued that the reason for this rule is that marriage cannot take the case out of the statute since it is marriage that brings the case within the statute. This argument is not sound, inasmuch as the statute applies to the bilateral as well as the unilateral contract; a promise to marry as well as actual marriage brings a promise to make a settlement within the statute.'

* * *

Affirmed in part and reversed in part for further proceedings not inconsistent herewith.

Note

It is interesting to note that while there are a number of cases from Florida courts noting that *antenuptial* or "pre-marriage" contracts must be in writing, there are no cases calling for *postnuptial* or "marriage-ending" agreements to be in writing. Rather, focus in the context of postnuptial agreements is whether they are unenforceable based on defenses such as for fraud, deceit, duress, coercion, misrepresentation, or overreaching. *See, e.g., Casto v. Casto*, 508 So. 2d 330, 333-34, (Fla. 1987); *Parra de Rey v. Rey*, 114 So. 3d 371, 383-85 (Ct. App. Fl. 3d Dist. 2013). *See also* Paul J. Carrier, *Pomtemkin's Village on the Divorce River: The Façade of Macar v. Macar*, 33 W. MICH. U. COOLEY LAW REVIEW 296, 301-12 (2016). This is interesting because all of these reasons are also defenses to enforcement. Review of other states' laws indicates that postnuptial agreements are not the subject of common law statute of frauds law and practice unless a state statute requires such agreements to be in writing. *See* 41 Am. Jur. 2d Husband and Wife § 111 (2d ed. as supplemented 2017). As a practical matter, such agreements are the subject of court oversight and approval, which may explain the reason why

this issue has not been addressed. The courts would require a writing to approve such agreements.

B. Agreement Not to be Performed Within Space of One Year

BROWNING v. POIRIER

Supreme Court of Florida, 2015

165 So. 3d 663

POLSTON, J.

We review the decision of the Fifth District Court of Appeal in *Browning v. Poirier,* 128 So.3d 144 (Fla. 5th DCA 2013), a case in which the Fifth District certified a question of great public importance. [Footnote omitted] We rephrase the certified question to the following as suggested by Chief Judge Torpy:

> Is a terminable-at-will agreement to pool lottery winnings unenforceable in the absence of an express agreement to continue the agreement for a period of time exceeding one year, when full performance of the agreement is possible within one year from the inception of the agreement[?]

Id. at 155 (Torpy, C.J., concurring in part and dissenting in part). We answer the rephrased question in the negative and quash the Fifth District's decision.

1. BACKGROUND

Petitioner Howard Browning and Respondent Lynn Anne Poirier lived together in a romantic relationship beginning in 1991. *Id.* at 145. In approximately 1993, the parties entered into an oral agreement in which they each agreed to purchase lottery tickets and to equally share in the proceeds of any winning lottery tickets. *Id.* On June 2, 2007, Poirier purchased a winning ticket and "collected one million dollars minus deductions for taxes." *Id.* When Browning requested half of the proceeds, Poirier refused, and Browning filed the underlying suit for breach of an oral contract and unjust enrichment. *Id.* However, Poirier denied the existence of any oral agreement to split lottery proceeds and raised the defense of the statute of frauds. *Id.*

At the close of Browning's case, Poirier moved for a directed verdict on two counts in Browning's complaint, and the trial court granted the directed verdict on both counts. *Id.* Specifically, the trial court granted a directed verdict on Browning's claim for breach of an oral contract, finding that the action was barred by the statute of frauds. *Id.* Additionally, the trial court "granted a directed verdict on Browning's claim for unjust enrichment, holding that a party seeking to enforce an express contract cannot simultaneously disavow the contract and seek equitable relief in quasi-contract." *Id.* The trial court entered final judgment in favor of Poirier. *Id.*

On appeal, a panel of the Fifth District entered an opinion on March 8, 2013, reversing the trial court. *Browning v. Poirier,* 113 So.3d 976 (Fla. 5th DCA 2013), *withdrawn and superseded on reh'g en banc by* 128 So.3d 144 (Fla. 5th DCA 2013). However, the Fifth District granted a motion for rehearing en banc, withdrew the panel opinion, and substituted an opinion in its place on November 8, 2013. *Browning,* 128 So.3d at 145.

Regarding Browning's claim for breach of an oral contract, the Fifth District looked to the statute of frauds as stated in section 725.01, Florida Statutes, and the "leading case interpreting this statute," *Yates v. Ball,* 132 Fla. 132, 181 So. 341 (1937), to find that "the trial court was correct in granting a directed verdict" and correct to "conclude[ ] that 'the intent was that the contract was to last and it did last, as it turns out, much longer than a year.' " *Browning,* 128 So.3d at 145–46. Specifically, the Fifth District discussed that Browning and Poirier intended the oral contract to last as long as they were in a romantic relationship, and " 'the parties contemplated that the relationship would last more than one year....' " *Id.* at 146 (quoting *Browning,* 113 So.3d at 979).

Therefore, the Fifth District "affirm[ed] the judgment under review regarding the count for breach of the alleged oral contract, but reverse[d] that part of the judgment regarding the count for unjust enrichment and remand [ed] this case to the trial court for further proceedings." *Id.*

2. ANALYSIS

In this Court, Browning argues that his oral agreement with Poirier to equally share in the proceeds of any winning lottery tickets they purchased falls outside the statute of frauds. We agree. [Footnote omitted]

Section 725.01, Florida Statutes, commonly referred to as the statute of frauds, provides the following:

> No action shall be brought ... upon any agreement that is *not to be performed within the space of 1 year from the making thereof* ...

> unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

(Emphasis added.) The issue here focuses on interpreting the one year performance provision of the statute of frauds for oral agreements of indefinite duration, where no time is fixed by the parties for the performance of their agreement.

In 1937, with its decision in *Yates,* 132 Fla. 132, 181 So. 341, this Court interpreted the one year performance provision of the statute of frauds. Yates, the plaintiff, was the holder by assignment of second mortgage bonds secured by a trust deed, falling due approximately four years from the date of entering the agreement. *Id.* at 342. The defendant contended that the agreement was within the statute of frauds. *Id.* at 344. In its analysis, this Court in *Yates* set out the following general and qualifying rules for interpreting the statute of frauds:

> When, as in this case, no definite time was fixed by the parties for the performance of their agreement, and there is nothing in its terms to show that it could not be performed within a year according to its intent and the understanding of the parties, it should not be construed as being within the statute of frauds.
>
> The general rule so stated is subject to the qualifying rule that when no time is agreed on for the complete performance of the contract, if from the object to be accomplished by it and the surrounding circumstances, it clearly appears that the parties intended that it should extend for a longer period than a year, it is within the statute of frauds, though it cannot be said that there is any impossibility preventing its performance within a year.

Id. (citations omitted).

After setting out these rules, this Court in *Yates* reversed a directed verdict and held that the oral agreement at issue was not subject to the statute of frauds. *Id.* at 344–45. This Court stated that "[w]hile the second mortgage bonds were not due for four years and the interest was payable semi-annually, they were by their terms susceptible of payment in full at any time upon notice given...." *Id.* at 344. This Court reasoned as follows:

> In our view, the agreement sued on was clearly within the general rule as here stated. It contains no express provision that it should not be performed within a year, nor is there anything embraced within its terms that shows conclusively that it was intended to

> run for more than a year. Under its terms, it is susceptible of performance within a year, and the evidence shows that it was expected to have been performed within that time. When such is the case, even if actual performance runs beyond the year, it is not within the statute of frauds.

Id. at 344–45.

Although the *Yates* decision was inartful in its discussion of a general and qualifying rule, [Footnote omitted] the manner in which this Court applied the statute of frauds in *Yates* is in accord with the majority approach to interpreting a statute of frauds:

> It is well settled that the oral contracts made unenforceable by the statute because they are not to be performed within a year include only those which *cannot* be performed within that period. A promise which is not likely to be performed within a year, and which in fact is not performed within a year, is not within the statute if at the time the contract is made there is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year.
>
> 9 *Williston on Contracts* § 24:3 (4th ed. 2011) (emphasis in original) (footnotes omitted). Stated otherwise, judging from the time the oral contract of indefinite duration is made, if the contract's full performance is possible within one year from the inception of the contract, then it falls outside the statute of frauds. *See Acoustic Innovations, Inc. v. Schafer,* 976 So.2d 1139, 1143 (Fla. 4th DCA 2008); *Wilcox v. Lang Equities, Inc.,* 588 So.2d 318, 320 (Fla. 3d DCA 1991); *Gulf Solar, Inc. v. Westfall,* 447 So.2d 363, 366 (Fla. 2d DCA 1984); *but see LynkUs Commc'ns, Inc. v. WebMD Corp.,* 965 So.2d 1161, 1165 (Fla. 2d DCA 2007); *Khawly v. Reboul,* 488 So.2d 856, 858 (Fla. 3d DCA 1986).

In this case, the oral agreement between Browning and Poirier is one of indefinite duration because, as the general rule in *Yates* states, "no definite time was fixed by the parties for the performance of their agreement." *Yates,* 181 So. at 344. Additionally, "at the time the contract [was] made there is a possibility in law and in fact that full performance" of the agreement between Browning and Poirier could have been "completed before the expiration of a year." 9 *Williston on Contracts* § 24:3. For example, if Browning or Poirier purchased a winning lottery ticket and they split the proceeds before the expiration of one year, the agreement would have been fully performed before the expiration of one year. Alternatively, either Browning or Poirier could have ended the agreement at any time. Accordingly,

judging from the time the oral contract was made, nothing in the terms of their contract demonstrates that it could not be performed within one year.

3. CONCLUSION

Because the oral agreement between Browning and Poirier could have possibly been performed within one year, it falls outside the statute of frauds. Accordingly, we answer the rephrased question in the negative. We quash the Fifth District's decision and remand for further proceedings.

It is so ordered.

Problem 13-1

Becky hires Tommy’s Construction Company (TCC) to build a large strip mall on her newly acquired vacant lot for the price of $2,000,000. Becky and TCC sit down on January 1, 2017 to discuss the project and TCC says that projects of this size have been taking between 10 and 14 months in the industry (and which is also in his personal experience). Becky tells TCC that she understands that projects like this usually take some time to construct. TCC receives the $2,000,000 payment to begin construction and purchase materials for the project. TCC begins work and completes the strip mall on February 21, 2018. Does their agreement comply with the Statute of Frauds? Would your answer change if TCC had completed the project early on November 1, 2017? If Becky and TCC agreed that the project would take at least 13 months to complete, would that need to be in writing? If the agreement failed to satisfy the Statute of Frauds, and was unenforceable, is there anything from Chapter XXII to assist TTC with some recovery?

C. Sale of Lands, Tenements, or Hereditaments

SOCARRAS v. CLAUGHTON HOTELS, INC.

District Court of Appeal of Florida, Third District, 1979

374 So. 2d 1057

EZELL, Associate Judge.

The issue presented to us for review is whether certain documents purporting to create a contract for the sale of real property were sufficient to satisfy the requirements of the statute of frauds. We hold that the documents in question were not sufficient to satisfy that statute. Accordingly, we affirm.

This action arose after a complex, multi-million dollar real estate transaction went awry. The appellant, acting in the capacity of a trustee for unnamed investors, initiated this suit seeking specific performance of an alleged agreement that purportedly obligated the appellee corporation to convey its interest in several acres of real property. After extensive discovery, the appellee moved for summary judgment on the grounds: (a) that the alleged contract was unenforceable under the statute of frauds, [Footnote omitted] and (b) that there was no enforceable agreement since the purported contract was too indefinite in its terms.

The trial court granted the motion for summary judgment and by separate order entered summary final judgment for the appellee. It ruled that the written documents constituting the alleged contract did not satisfy the statute of frauds.

At their next meeting, Socarras handed Claughton a retyped version of the RAMCO form containing essentially his original offer, including the $3,000,000 purchase price. After consulting with his tax advisor, Claughton again informed Socarras that he would not sign any contract until it could be thoroughly reviewed regarding its possible tax consequences. When Socarras responded that he needed something to show his financial backers that an agreement was imminent, Claughton obliged by drafting a handwritten note which read as follows:

> “Mr. Bill Socarras,
>
> Dear Bill,
>
> I would like to sell the Silver Sands Oceanfront Motel with an area of approximately 4.3 acres on Key Biscayne under the following terms and conditions:
>
> > Price $3,000,000.00
> >
> > Terms: $ 150,000 at closing about 90 days after contract with a $50,000.00 deposit with your attorneys; of which shall be a part of the sum at closing.
> >
> > $ 720,000.00 payable on or about August 1, 1978; and

> the balance in a purchase money mortgage payable over three years at 81/2% interest while 1st mtg. status and 10% interest while subordinated; payable in full or in part at any time after the first year without penalty; and may be subordinated to an institutional first mortgage
>
> Sale includes personal property owned by the seller except for certain personal items such as paintings, wall coverings, boats and the like, except for the 2 duplexes.
>
> This is an exclusive offer to sell net at this price for a period of time not to exceed Aug. 15, 1977.
>
> Many thanks for your understanding.
>
> Sincerely,
>
> Claughton Hotels, Inc.
>
> by: E. N. Claughton, Jr.
>
> attest: Suzanne C. Matthews“
> Claughton signed and delivered the handwritten note to Socarras and returned the retyped RAMCO form unsigned.

Three weeks later, after further extensive negotiations, the transaction fell through when Claughton learned that the sale would have very adverse tax consequences to his corporation. Although Socarras was given another opportunity to work out acceptable terms, when he returned with another RAMCO form containing essentially the same terms as originally proposed, Claughton refused to sign. After several subsequent fruitless meetings failed to produce any written agreement, the negotiations concluded without a sale.

Socarras then filed a complaint in the circuit court seeking specific performance of a contract that he alleged was created by virtue of Claughton's handwritten note and the unsigned RAMCO form. He contended that the parties entered into an enforceable contract at that time and that there was no necessity for any subsequent written agreement formalizing the conveyance. He maintained that the RAMCO form and the handwritten note were sufficient, when taken together, to satisfy the statute of frauds. The circuit court disagreed with him on this point.

To be an enforceable land sales contract, the statute of frauds [Footnote omitted] requires the contract to satisfy two threshold conditions. First, the contract must be embodied in a written memorandum signed by the party

against whom enforcement is sought. Sill v. Ocala Jewelers, 210 So.2d 458 (Fla. 1st DCA 1968). Second, the written memorandum must disclose all of the essential terms of the sale and these terms may not be explained by resort to parol evidence. Rundel v. Gordon, 92 Fla. 110, 111 So. 386 (1927); Cohodas v. Russell, 289 So.2d 55 (Fla. 2d DCA 1974). In our view, the summary judgment entered below must be affirmed since neither of these two essential prerequisites were met.

Initially, we note that the appellant concedes that the RAMCO form was never signed by the appellee. Appellant's ingenuous effort to persuade the court that an enforceable agreement was created by the physical attachment of the unsigned RAMCO form to the signed handwritten note must fail. It is established law that in order for an unsigned writing to be used to supply the essential elements of an enforceable contract, there must be some reference to that unsigned writing in the signed writing. Meek v. Briggs, 80 Fla. 487, 86 So. 271 (1920). Nowhere in Claughton's handwritten note is there the slightest reference to the RAMCO form or any other document. Throughout the record, the handwritten note and the RAMCO form were separately discussed and treated by the parties. Even if the two documents were attached and discussed together, this would not be sufficient to constitute an enforceable contract where the writings were not connected by internal reference.

Further, the handwritten note is not enforceable by itself since it contains numerous unclear terms that could not be known or understood without recourse to inadmissible parol evidence. There is no definitive list of essential terms that must be present and certain to satisfy the statute of frauds. Rather, the essential terms will vary widely according to the nature and complexity of each transaction and will be evaluated on a case by case basis:

> “Where it is sought to enforce in equity a contract for the sale of land, it is essential that the terms of the contract shall be expressed with reasonable certainty, and what is reasonable in any case must depend upon the subject-matter of the agreement, the purpose for which it was entered into, the situation and relation of the parties, and the circumstances under which it was made.”

Rundel v. Gordon, supra at 111 So. 388-389.

In a situation such as the present case, where the alleged agreement involves a large and very complex real estate transaction, it is readily apparent that all of the essential terms of that transaction were not included in Claughton's handwritten note. An examination of the note reveals some of the more conspicuous omissions. For instance, it contains only the suggestion that the appellee “would like to sell” the Silver Sands Motel. The identity of the

ultimate purchasers is not given and it is not clear as to how the deferred payment financing arrangement would work, or when the purchase money mortgage payments would begin. The note makes reference to personal property to be excepted from the contemplated sale, but there is no clear identification of the items that Claughton Hotels would retain. The note also makes mention of a possible future subordination of the purchase money mortgage to a new first mortgage, but none of the terms of this contemplated subordination were delineated.

In short, the handwritten note evidences only Claughton's willingness to negotiate a contract with potential purchasers who might be interested in the general terms that he outlined. The note did not incorporate all of the essential terms necessary to make an enforceable contract for the sale of the land. It reflected only the state of negotiations at that point, preliminary negotiations which never ripened into a formal agreement. Under these circumstances, the trial court was eminently correct in entering summary judgment for the appellee.

Affirmed.

Note

Those who have not yet taken a property course may find terms such as *tenements* or *hereditaments* somewhat exotic. *Tenements* are possessory rights in land, including the right to collect rent; *hereditaments* are rights in land that may be inherited by the holder's devisees if there is a will or by intestate succession as heirs where there is no will. Both are relatively sweeping terms and depending on how they are used, may include subsurface minerals, rights of easement, etc.

1. Part Performance Exception

Without being too direct, might there be other situations where part performance may save an agreement from the Statute of Frauds defense in other rules? Anticipating and recognizing similarities between laws goes one step beyond memorization and one step toward full integration of one's knowledge.

AVERY v. MARINE BANK & TRUST CO.

District Court of Appeal of Florida, Second District, 1968

216 So. 2d 251

PIERECE, Judge

* * *

The sole question presented here for determination is the sufficiency of the amended Count I, hereinafter referred to as Count I, to state a cause of action, namely, whether the averments, if true, were sufficient to warrant an equity Court in decreeing specific performance of an oral contract between Flossie R. Blair, since deceased, and Marion R. Avery, whereby the former had allegedly agreed to convey to the latter certain described real estate, known as 'Blair Acres', in consideration of rendition by Avery of certain personal services to her during her lifetime. The Chancellor held, that, as a matter of law, plaintiff was required to allege, in addition to part performance on his part, that he had been in possession of the premises involved, pursuant to the oral contract, and that inasmuch as such possession was not alleged, and plaintiff conceding that he could not show such possession, specific performance of the contract was not warranted. Count I, which is the only count here involved, was thereupon dismissed with prejudice. We agree with the Chancellor, and therefore affirm.

Said Count I alleged substantially the following facts: that on July 4, 1950, Flossie R. Blair, being the sole owner of certain described lands in Hillsborough County known as 'Blair Acres', orally contracted with plaintiff Avery that if he would 'assist' her 'in the running of Blair Acres and other personal businesses' and 'in and about her person and needs and be always on call as he was needed, at no charge', 'she would, prior to her death, convey' said premises to Avery 'at a price to be agreed upon prior to' her death, 'not exceeding the fair market value of the property' at such time, 'and with due credit' for Avery's 'endeavors, labor and expenditure in and about the premises of Blair Acres and for the personal services, comforts, and conveniences furnished' to Mrs. Blair; that on August 15, 1966, Mrs. Blair and Avery agreed on the sum of $95,000.00 as the cash consideration for the conveyance; that from July 4, 1950 to her death on January 18, 1967, plaintiff Avery 'faithfully performed on the aforesaid contract, treating, tending and feeding the cattle and animals on Blair Acres, maintaining and assisting in the maintenance of the premises, loaning money' to her, 'counselling and assisting' her 'in the management and running of the premises * * * and in and about her person without payment and in reliance on the oral contract between' them; that Mrs. Blair never 'made the agreed conveyance' to Avery though he was at all times 'ready, willing and able to complete the said oral contract by payment of the $95,000.00'; that although the contract between them 'was oral in nature, the relationship' between them 'was of such a close and personal nature' and his services under the contract were so 'incapable of monetary measurements that it would be inequitable, unconscionable and unjust and constitute an unduly harsh burden and loss' upon him if conveyance of Blair Acres was not presently decreed. Plaintiff Avery prayed for a decree ordering conveyance of the premises to him upon the payment of the $95,000.00.

The defendants moved to dismiss said Count I on numerous grounds, the Court granted the motion, and plaintiff Avery has appealed here.

As stated, the sole question before this Court is whether the allegations of Count I, the substance of which has just been narrated, could warrant a decree for specific performance. Two crucial facts are conceded: (1) the agreement, if any, between Mrs. Blair and plaintiff Avery was entirely oral-nothing in writing; and (2) Avery was never in possession of the real property involved or any portion thereof.

It is axiomatic that, under the Statute of Frauds, F.S. § 725.01 F.S.A., a mere oral contract for sale of lands is not enforceable in Florida. It is also fairly well established that such rule is subject to certain recognizable factual exceptions. We therefore review the Florida decisions that throw light upon the instant controversy.

The Supreme Court in *Wilson v. Wilson*, 1938, 132 Fla. 518, 181 So. 385, stated the following:

> 'This suit was brought against the administrator and the heirs of an elderly lady decedent, to require conveyances in the nature of a specific performance of an alleged oral contract of the decedent with her nephew * * *; the alleged consideration for the oral contract being personal attentions and business services and assistance rendered by the plaintiff nephew to the decedent at her request during the last months of her life.

The chancellor dismissed the bill of complaint on motion, and plaintiff appealed.

It is not alleged that the decedent Intentionally put the plaintiff into actual possession or control of any portion of the land * * * in consideration of the aforesaid personal attentions and business services and assistance, even if that would make a case for the relief prayed.

Considered as an entirety, the allegations of the bill of complaint are legally insufficient to justify a decree for the relief prayed'. (Emphasis supplied).

In *Battle v. Butler*, 1939, 138 Fla. 392, 189 So. 846, the Supreme Court held that an oral contract by which an owner agreed to convey or devise a part of the realty holding to a relative, who thereafter actually lived with the owner and his wife as their daughter, 'was invalid under (the) statute of frauds and would not be specifically enforced, where there was no written memorandum and No delivery of possession of any property'. (Emphasis supplied) The

aforesaid rule stated in Wilson was quoted as authority for the holding in *Battle*.

In *Gable v. Miller*, Fla.1958, 104 So.2d 358, plaintiff Anna Miller sued the administrator and heirs at law of a decedent for specific performance of an oral contract whereby the decedent allegedly had promised if she would reside with him in his home and perform services therein such as cooking, housekeeping, cleaning the house, and otherwise taking care of him in his declining years, "he would pay her $25.00 cash per week, buy a new car for her, and further promised that before his death he would will to the plaintiff the said lot 5 and improvements thereon and the furniture, furnishings and fixtures contained * * *' therein and that she (plaintiff Miller) had accepted said offer and fully performed her portion of the agreement, but that (the decedent) had not willed her his home and the contents nor purchased her a new car, although he had paid her $25 per week'. While the decision of the Supreme Court 'went off' on the question of the degree of proof necessary to establish the existence of the oral contract, the opinion went further and stated that-

> '* * * we are of the opinion that had we found the proof of the existence and terms of the contract to be sufficient, we would nevertheless have been required to reverse the cause for lack of proof of the Element of possession by plaintiff. See Williams v. Bailey, 1915, 69 Fla. 225, 67 So. 877, supra; Wilson v. Wilson, 1938, 132 Fla. 518, 181 So. 385; Green v. Price, Fla.1953, 63 So.2d 337; 49 Am.Jur., Statute of Frauds, Sec. 521, and 37 C.J.S. Frauds Statute of § 252(a)(2).' (Emphasis supplied).

The Florida Supreme Court has consistently held that a verbal contract to convey real estate may be enforced by specific performance, provided the owner has placed the prospective grantee in possession of all or a substantial part of the premises involved, coupled with the existence of one or more other pertinent factors. Such 'other pertinent factors' have been-where the prospective grantee has 'paid the purchase money, erected a dwelling house on the land, enlarged the enclosures, (and) set out many fruit trees', Tate's Adm'r. v. Jones' Ex'r., Fla.1877, 16 Fla. 216-or 'has paid a part of the purchase price', Clark & Lewis v. Gardner, 1926, 91 Fla. 1059, 109 So. 192; Pedrick v. Vidal, 1928, 95 Fla. 952, 116 So. 857; Dixon v. Clayton, Fla. 1950, 44 So.2d 76; Crossman v. Fontainebleau Hotel Corp., (1959) CA 5 Fla., 273 F.2d 720; 80 A.L.R..2d 415; S. Lemel, Inc. v. 27th Avenue Farmer's Market, Inc., Fla.App.1961, 126 So.2d 167-or when he has substantially 'improved the property', Taylor v. Mathews, 1907, 53 Fla. 776, 44 So. 146; Board of Public Instruction of Palm Beach County v. McDonald, 1940, 143 Fla. 377, 196 So. 859-or where the daughter of the father-owner 'left her home in New York and moved to Florida with her child, took possession and rendered services in managing and operating the property' which services were not 'capable of

adequate pecuniary measurement and compensation', Cottages, Miami Beach, Inc. v. Wegman, Fla.1952, 57 So.2d 439.

But in addition to the one or more 'added considerations' quoted above, there must always be the indispensable element of Possession of the premises on the part of the impending grantee, as it was in each of the foregoing cases. Possession is the one common denominator in all the cases. If there is no possession given, the oral contract to convey is not enforceable, regardless of the other considerations aforesaid.

Thus, payment of the purchase price of the land alone is not enough, his remedy being at law for recovery of his monetary consideration. Neal v. Gregory, Fla.1882, 19 Fla. 356. Nor is the 'mere rendition of services by (one) in reliance upon another's parol promise to convey real estate to him * * * sufficient * * * to * * * warrant specific performance of (it) where the services are capable of adequate pecuniary measurement and compensation'. Cottages, Miami Beach, Inc. v. *Wegman*, supra. Nor 'paying part of price, and making improvements'. Fireman's Fund Ins. Co. of San Francisco v. Cravey, 1931, 101 Fla. 155, 134 So. 232. Nor payment of consideration and 'the making * * * of valuable and permanent improvements upon the land with the consent or acquiescence of the vendor'. Baker v. Rice, Fla.1948, 37 So.2d 837.

The second appearance of the *Wegman* case in the Supreme Court, Fla.1952, 59 So.2d 528, sheds further light upon the necessity of possession. It was made to appear, after the first opinion in the case in 57 So.2d 439, supra, that appellee Wegman had perhaps never been in possession of a certain part of the land involved, known as the 'Bayfront Tract', and the Supreme Court thereupon, of its own motion, wrote a supplementary opinion, which is inter alia as follows:

> 'Counsel for appellants insist There is no showing in the record that Elsie Wegman, appellee herein, was ever in possession of the tract or parcel of land known as the 'Bayfront Tract'. They contend, therefore, that since our original opinion is predicated upon the theory that the Statute of Frauds, F.S.A. § 725.01, is not a bar to the enforcement of the oral agreement to convey an interest in the subject real property, Because Elsie Wegman was in possession thereof and had in part performed the contract, our opinion and judgment must be modified with reference to the parcel of land known and designated as the 'Bayfront Tract'.

Consequently, * * * we have decided sua sponte to remand this cause * * * to permit * * * a reopening of the case * * * to determine whether Elsie Wegman was in possession of the 'Bayfront Tract' under her agreement with her father * * *. If further proceedings should be taken in this matter and the Chancellor should determine That Elsie Wegman did not have possession of the 'Bayfront

Tract' during the period of time within which she was performing her part of the contract, an appropriate modification of the final decree should be made denying relief to her in connection with said 'Bayfront Tract". (Emphasis supplied).

In the case of Rowland v. Ewell, Fla.App.1965, 174 So.2d 78, this 2nd District Court, while the oral contract there involved did not concern real estate, took occasion to review and construe the previous Florida cases involving realty in like circumstances, as follows:

> 'The Florida courts have held that part or complete performance of an agreement, not capable of performance within one year and not in writing may be enforced Under certain circumstances. The cases which have set forth exceptions have involved contracts for the purchase of realty, Battle v. Butler, 1939, 138 Fla. 392, 189 So. 846. This case and the others involving contracts for purchase of realty uniformly hold that the elements necessary to take them out from under the operation of the statute of frauds are that The purchaser must enter into possession, pay all or at least a part of the consideration, and make valuable and permanent improvements. Undoubtedly, this exception has been recognized under such circumstances because the acts are consistent with the existence of a Contractual relationship.'

On the other hand, in Miller v. Murray, Fla.1953, 68 So.2d 594, enforcement of an alleged oral contract to purchase realty was denied because the plaintiff had previously leased the premises. The court denied the relief requested because the Possessory interest of the plaintiff, as well as the other acts relied on as constituting part performance were as Equally as consistent with a tenancy status' as with that of a vendee. The act or conduct relied on as constituting part performance must be Referable exclusively to the contract and nothing else. Purvis v. Malloy, etc., 1937, 129 Fla. 191, 176 So. 71; Millier v. Murray, supra.' (Emphasis supplied).

Upon the controlling authority of the foregoing cases, we are constrained to hold that Count I in the case sub judice was deficient for failure to allege that plaintiff Avery had been in possession of the premises involved, and that the Chancellor was without error in granting motion to dismiss the same.

This is no way affects the right of plaintiff to sue for the value of his alleged services to the decedent Mrs. Blair during her lifetime, as indeed he is seeking so to do in Count II in the instant case, and his right of recovery therein will be governed by and dependent upon the rules of law pertaining to such action for monetary damages.

The interlocutory order appealed from is thereupon

Affirmed.

LILES, C.J., and ALLEN, J., concur.

Notes

1. For MBE purposes, the writing for a land-sale contract must be (1) signed by the party to be charged, (2) identify both parties to the contract, (3) include the consideration, and (4) describe the property. Contrast these elements with other Florida-specific cases that speak to the essential elements needed for a land-sale contract to be enforceable. In *Rundel v. Gordon*, 92 Fla. 1110, 111 So. 386 (1927), the court emphasized that, "[t]he matter of consideration, manner of payment, security for deferred payments, interest, dates when they shall become due, acts to be done by either party, and other essential conditions of the contract, must be certain, and must so appear from the written memoranda constituting the contract. . . .' Also, *Alton Beach Realty Co. v. Henderson*, 92 Fla. 689, 110 So. 256 (1926) stated, "the Supreme Court construed an exchange of correspondence as not containing the essential elements of a contract for the sale of land so as to comply with the Statute of Frauds. As a premise for its holding, the court pointed out: '. . . (T)here is no reference to the amount of the initial cash payment or what proportion it bears to the total purchase price, nor is the total purchase price or the terms of the alleged sale set forth in any writing, signed by the party to be charged. . . .'"

2. *Interlocutory appeals* are special requests for speedy review of orders issued by courts of first instance. They seek an appellate ruling on in important question of law to be determined before a court of first instance concludes by ruling on a case before it. The idea is to secure a clear understanding of law before the final ruling, the failure of which could lead to a substantial injustice, and probably an appeal. A good example is where, without a clear statement of law, a court is asked to permit a sale of land. Better to clarify law and reach the proper result than decide wrongly and try to undo a sale after, for example, structures thereon have been demolished. This is the proper subject of a Civil Procedure course.

Problem 13-2

Steve is in the market to purchase a home. James recently placed his home located at 123 Applian Way for sale, since he owns three other homes in the area and is planning on downsizing the number of his real property locations. As soon as Steve saw the home, he fell in love with it. On October 24, 2017,

Steve offered to purchase the home for $300,000 and James quickly accepted the offer. Steve remembered hearing something about how the sale of a home needed to be in writing, so Steve and James quickly wrote the following on a napkin, “This contract constitutes the completed action of James selling his house to Steve. Dated October 24, 2017.” Does this contract comply with the Statute of Frauds? Would your answer change if it had been formally typed out on paper? In the case that their contract does not comply with the Statute of Frauds, what could they have done to comply with the Statute of Frauds?

2. Leases Longer than One Year

CORAL WAY PROPERTIES, LTD. v. ROSES

District Court of Appeal of Florida, Third District, 1990

565 So. 2d 372

PER CURIAM.

The question presented by this appeal is whether the principle of promissory estoppel may be invoked to prevent the assertion of a statute of frauds defense. We hold that it may not in accordance with settled rules of law and reverse the judgment on appeal.

Coral Way, owner of an office building, leased space to International Securities System Corp. (ISS) for three years. ISS, in turn, subleased part of the premises to Joseph Roses. Coral Way filed an eviction action after ISS defaulted in monthly rental payments with eighteen months remaining on the lease. The court order evicting ISS specifically provided that Roses, who had joined the suit as an intervenor plaintiff, was not to be evicted. Roses tendered monthly payments at the same dollar per square foot rate as charged to ISS. Coral Way refused to accept the payments and the rent was therefore paid into a trust account, with notice to Coral Way.

Roses, who represented ISS in negotiating its lease with Coral Way, contends that he relied on Coral Way's oral assurances that he would be able to continue to occupy the subleased space even if ISS was evicted. Based on these alleged assurances and with Coral Way's knowledge, Roses relocated his professional accounting practice to Coral Way's office building and improved the physical space at considerable expense. It is undisputed that Roses installed a new glass entrance door, partitioning, paneling, electrical wiring and an air conditioner.

This appeal is brought from a partial final declaratory judgment which determined that appellee, Joseph Roses, could enforce the sublease and

maintain possession of rental office space after eviction of the lessee for nonpayment of rent, notwithstanding the absence of a written lease agreement with Coral Way.

Promissory estoppel is a qualified form of equitable estoppel, *Crown Life Ins. Co. v. McBride,* 517 So.2d 660 (Fla.1987), based on "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance.... [The promise] is binding if injustice can be avoided only by enforcement of the promise." *Restatement (Second) of Contracts,* § 90 at 242 (1987).

It has been held, however, that an application of promissory estoppel to avoid a statute of frauds defense would defeat the stated purpose of the statute:

> The Statute of Frauds grew out of a purpose to intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos.

Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So.2d 777, 779 (Fla.1966) (quoting *Yates v. Ball,* 132 Fla. 132, 181 So. 341 (1937)). By legislative enactment, a properly executed written contract is a prerequisite to any action in certain transactions, to include "any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning them, or for any lease thereof for a period longer than 1 year ..." § 725.01, Fla.Stat. (1987). This case is controlled by *Tanenbaum,* where the supreme court declined to adopt promissory estoppel as a judicial counteraction to the legislatively created statute of frauds.

Reversed and remanded with instructions to enter judgment for the appellant.

D. Executor or Administrator to Pay Debt out of Own Estate

In certain cases, individuals are designated or appointed to close out the affairs of a business on wind-up, or bankruptcy, or to identify, collect, and properly distribute the assets in the estate of a deceased as part of the probate process whether by designation in a will or by appointment by a probate court. These individuals are given names such as "trustee," "administrator," and "executor" (and its Latin feminine "executrix"). Often when the "agent" and the recipients are known to each other, informal agreements about things such as early distributions are done by handshake, only to be denied later. For example, imagine an agreement between a will's

executor and a creditor. It could even be an agreement between the executor and a will beneficiary who requests an early devise that should be netted out of that beneficiary's share upon final distribution. If not in writing, what is the likelihood that the "paid" creditor or the "already benefitted" beneficiary would deny receipt in the hope of collecting twice?

The case that follows does not exactly fit the typical fact pattern of a deal between an executor and a beneficiary. Rather, the *Green* case appears to be quite similar in its facts, issues and rules to the *Avery* case in Section B.3.a of this Chapter. It is sometimes difficult to find cases directly on point when restricted to a single jurisdiction's case law. For purposes of this subsection, pretend that the person with a will had already died, and it was the executor of the will who is alleged to have agreed with claimant Green. Thus, a will's executor has allegedly made an oral agreement with a creditor to pay (typically, out of executor's own funds, since he or she often will get a share of the proceeds in probate anyway). At some point, perhaps as the estate shrinks, a creditor is ready to say anything in order to recover. The incentive for fraud should be obvious. To avoid fraud, a writing is required. (Remember: this is not the same as saying that there is no contract; instead, the idea is that due to strong chance of fraud, there is a defense to enforcement of a contract). For a quintessential example of this long-standing rule, *see, e.g., Bemis* 5. *Larkin*, 249 A.D. 762 292 N.Y.S. 250 (Supreme Court of New York, Second Department 1936). There are, however, other examples, such as when an executor is not authorized to honor an alleged oral agreement between decedent and a beneficiary. *See Mossman v. Hawaiin Trust Co.*, 45 Haw. 1 361 P.2d 374 (Sup. Ct. Hawai'i 1961).

GREEN v. PRICE

Supreme Court of Florida, 1953

63 So. 2d 337

TERRELL, Justice.

* * *

Several questions are presented for determination but the parties are not in agreement as to their statement or content. The crucial point in the case is whether or not the alleged oral contract was sufficiently definite to compel performance even if requirements of the State of Frauds, F.S.A. § 725.01, are met.

It appears that Hattie E. Phippen, a widow, owned Lots 1, 2, 3, 4, and 5, Block 69, Northgate Subdivision, Miami, and that her home was on Lot 4. On advice of friends, she induced appellant and his wife to move in and occupy a portion of her home rent free. Several months later on information from complainant

that he had acquired a home in another part of the city and expected to occupy it soon, Mrs. Phippen made him the proposal on which this suit is predicated, as follows: ‘if I would not move out and leave her and would stay with her and continue to do the things I had been doing, that she would leave me the home place’ or ‘if we would stay on and continue as we had been doing, caring for her and staying with her night times and not leaving her alone, that she would give us the home place there.’

This proposal was made early in 1949 and was accepted by complainants. They continued to reside with Mrs. Phippen until a few months before her death, July 6, 1951. At that time they were in South Carolina where they had been for about ten weeks, building a house, but returned for the funeral and lived in the Phippen home until they were requested to pay rent by the executor, Mrs. Phippen having executed her will and left her estate to relatives. There was no provision in the will for the benefit of appellant so he brought this suit to compel performance of the alleged oral agreement.

The court has repeatedly held that equity will not enforce a parol gift of land in face of the Statute of Frauds, absent conclusive proof of these elements: (1) words showing an intent to give the land, (2) that possession was taken in reliance on the gift, and (3) that the donee made permanent and valuable improvements in anticipation of the gift, with the donor's acquiescence. Chamberlain v. Chamberlain, 115 Fla. 21, 155 So. 136, and many others. Appellees contend that relief should be denied because they say the point should have been litigated in the probate court the assets being in the hands of the executor under the will of Mrs. Phippen. We are not convinced of the merit to this contention because complainant elected to bring a suit for specific performance. He had a right to do this and the circuit court had jurisdiction of the cause. The Circuit Court also has coordinate jurisdiction with the probate court in probate matter.

A fair appraisal of the evidence shows that Mrs. Phippen made the proposals to appellant in substance the equivalent of that heretofore referred to and quoted. It is admitted that the parol promise was never reduced to writing, and it does not appear that appellant took such possession of the place and made improvements on it that would satisfy the Statute of Frauds. Such possession as he assumed was the occupancy of a portion of the home, rent free, in exchange for company and protection to Mrs. Phippen. It is shown that appellant painted the house and made other minor improvements, but Mrs. Phippen paid him for them. There is no showing that appellant made permanent improvements on the property, at his own expense in anticipation of the gift. He is not shown to have had dominion over the property at any time.

The evidence also shows that appellant left Mrs. Phippen ten weeks before she died and went to South Carolina to build a house. It is true that he

returned for her funeral but she was badly in need of his services while he was away, a portion of which time she occupied a rest home. He has never paid any taxes or insurance on the property. He did not file a claim for services or institute this suit for specific performance for more than three months after Mrs. Phippen's death. The evidence further shows that Mrs. Phippen made no provision in her will for appellant, that the will was duly probated and notice to creditors was given but that appellant did not offer to contest the will or file any claim against the estate for services. Even if the agreement was definite enough to be enforced, the evidence fell far short of meeting the requirements of the Statute of Frauds. The chancellor so found and dismissed the bill.

The chancellor also found that the plaintiff failed to prove any unpaid claim against the estate of Mrs. Phippen. The primary issue before the court was specific performance. The bill of complaint prays in the alternative for accounting but we find nothing to support such a prayer. If he has a claim against the estate he had his remedy at law. The decree appealed from is therefore affirmed.

Affirmed.

HOBSON, C. J., and SEBRING and MATHEWS, JJ., concur.

E. Contracts for the Sale of Goods

LA ROSA v. FORTIER

District Court of Appeal of Florida, Fourth District, 1986

492 So. 2d 425

HERSEY, Chief Judge.

Appealed is the lower court's order directing appellant, La Rosa, to transfer her interest in a jointly owned automobile to appellee, Fortier, in exchange for payment by Fortier of $1,000. We reverse.

La Rosa and Fortier formerly lived together, during which time they acquired a 1979 Toyota automobile in their joint names. Upon their separation the trial court ordered, pursuant to the parties' agreement, that Fortier would pay La Rosa one-half of the value of the automobile as determined by the automobile trade journals as of a specified date. It was stipulated that the value of La Rosa's half-interest was $2,912.50.

La Rosa subsequently moved for enforcement of the final judgment's provisions regarding the automobile, at which time Fortier and his former

counsel asserted that La Rosa had orally agreed to accept $1,000 in exchange for her interest in the Toyota. La Rosa denied any such agreement. The trial court upheld the oral agreement and entered judgment accordingly.

We conclude that the parties' oral agreement to modify the terms of the prior final judgment violates the applicable statute of frauds and is therefore unenforceable. Section 672.201(1), Florida Statutes (1983), provides in relevant part that:

> [A] contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Sale of a part-interest in goods is considered a sale of goods, section 672.105(3), Florida Statutes (1983), and it is undisputed that the price of La Rosa's interest in the automobile exceeds $500. Further, section 672.201 is applicable to an agreement modifying a contract, as well as to the original contract. See § 672.209(3), Fla.Stat. (1983).

The final matter for our consideration is whether the statute of frauds is rendered inapplicable because the oral modification was in the nature of a settlement agreement. In *Perimeter Investments, Inc. v. AmeriFirst Development Co.,* 423 So.2d 586 (Fla. 1st DCA 1982), the statute of frauds regarding sales of real property was held applicable to a settlement agreement involving the transfer of an interest in land. We see no reason to apply a different rule to sales of goods. Therefore, we hold that characterization of the oral agreement of La Rosa and Fortier as a “settlement agreement” does not abrogate the requirement of compliance with the applicable statute of frauds.

Accordingly, we reverse the trial court's order directing transfer of La Rosa's interest in the parties' automobile to Fortier in exchange for payment by Fortier of $1,000, and remand with directions to the trial court to enter an order providing for payment to La Rosa by Fortier of $2,912.50, plus interest from the date of the final judgment.

REVERSED and REMANDED with directions.

DOWNEY and GUNTHER, JJ., concur.

(1). Merchant Confirmation Exception

Although full-blown consideration of U.C.C. Article 2 needs be left to a subsequent Commercial Transactions course, readers are probably sensing a

more business-friendly and amicable approach for sale of goods transactions than is exercised in situations involving common law contracts (e.g., services, employment). In fact, this is evident in the following Florida statute:

> **671.102 Purposes; rules of construction; variation by agreement.—**
>
> (1) This code shall be liberally construed and applied to promote its underlying purposes and policies, which are:
>
> (a) To simplify, clarify, and modernize the law governing commercial transactions.
> (b) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.
>
> (c) To make uniform the law among the various jurisdictions.

Accordingly, common and oft-practiced business practices are to be encouraged. Additionally, certain of the more restrictive practices of the common law are to be replaced.

An example of this is what may be called a *merchant's memo*. Whereas at common law the Statute of Frauds requires certain contracts to be in writing at the moment of formation, commercial rules allow the writing to follow an oral agreement. Thus, for example, an agreement made over the phone, so long as a proper memorial of same is created and sent to the other party (who does not object) within a reasonable time, avoids Florida's Statute of Frauds requirement of a writing at formation:

> **672.201 Formal requirements; statute of frauds.—**
>
> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> (2) *Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is*

> *given within 10 days after it is received*. (Emphasis added). (The remaining subsection is provided in Section ii below).

This provision is mirrored in the sale of securities, considered in the next case excerpt.

KHOSHNOU v. PAINE, WEBBER, JACKSON & CURTIS, INC.

District Court of Appeal of Florida, Fifth District, 1988

525 So. 2d 977

PER CURIAM.

* * *

The record established that Khoshnou opened a brokerage account with Paine, Webber in 1980. His son was named attorney-in-fact to trade on the account. During June, July and August of 1985, Paine-Webber sent confirmation slips and statements to Khoshnou, which neither he nor his son objected to. The account had a negative balance, becoming increasingly negative over that time period. Khoshnou alleged his account was not active, and that *Paine-Webber lacked authority* from him or his agent, to enter into the transactions evidenced by the confirmations.
Paine-Webber relies solely on section 678.319(3) to sustain the propriety of the summary judgment in its favor. That section provides:

> **678.319 Statute of frauds**.-A contract for the sale of securities is not enforceable by way of action or defense unless:
>
> (3) Within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under subsection (1) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within 10 days after its receipt;

We do not think subsection (3) is dispositive in this case. Subsection (3) is only *one* of four ways the statute of frauds applicable to transactions involving securities under the UCC may be satisfied. [Footnote omitted] The Florida Code Comments to this section expressly provide that subsection (3) is "new" to Florida law, and that it is to be interpreted like section 672.201(2), the Statute of Frauds provision regarding sale of goods and written confirmation between two merchants. [Footnote omitted] The Uniform Commercial Code Comment to 2-201(2) (672.201(2)) provides that the *only* effect this section has "is to take away from the party who fails to

answer the defense of the Statute of Frauds; *the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected.*" (Emphasis supplied).

The authorities writing on the UCC regarding the effect of these twin provisions is as stated in the comment. *Anderson on the UCC* section § 8-319:6, page 324 (1985) says:

> The fact that a writing or conduct satisfies the requirements of the statute of frauds does not in itself establish the existence of the alleged oral contract. The party claiming that an oral contract existed has the burden of proving that there was such a contract and its terms....

White & Summers, *Handbook on the Uniform Commercial Code* § 2-3, p. 57 (2d ed. 1980) also says:

> "[T]he theory is that a complying memo itself is not conclusive proof of the existence of the oral contract, let alone of its terms. Beyond producing a memo "sufficient to indicate that a contract for sale has been made between the parties," the plaintiff must still persuade the trier of fact that the parties did make an oral contract and that its terms were thus and so. By parity of analysis, a defendant who unsuccessfully pleads the defense of the statute of frauds may still "defend on the facts" and prevail, that is, he may still persuade the trier of fact that no contract was ever made."

Cases applying the UCC Statute of Frauds provisions reach results consistent with the Code Comments and the above quoted authorities. In *General Matters, Inc. v. Penny Products, Inc.,* 651 F.2d 1017 (5th Cir.1981), the court applied Florida law in a case involving the statute of frauds defense in a sale of goods. The trial court was affirmed by the circuit court in its finding that an order satisfied the statute of frauds, pursuant to section 672.201(2). The court said that the only effect subsection (2) had was to allow the plaintiff the use of oral testimony to prove both the existence and the terms of the contract. *See also Tripp v. Pay'N Pak Stores, Inc.,* 268 Or. 1, 518 P.2d 1298 (1974) (similar result reached in securities statute of frauds UCC § 8-319).

* * *

Consistent with these holdings is *Alderson v. Francis 1. duPont & Company,* 251 So.2d 710 (Fla. 3rd DCA 1971). In *Alderson,* the statute of frauds was raised as a defense in a suit by a customer against a broker. The DCA reversed the trial court's finding that a letter proved in that case was not a sufficient memoranda to defeat the defense under either section 8-319(a) or

(c). However, the court did not direct entry of judgment based on the memoranda. It remanded the case for trial on the merits.

Basically, that is the procedure we think should occur in this case. The confirmations and no objection thereto were sufficient to bar the statute of frauds defense. However, that does not by itself conclusively establish the terms of the contract. Paine-Webber still has the burden to persuade the trier of fact that an oral contract was made, and Khoshnou may raise any defenses he has, including lack of authority. These defenses were pled, supported by affidavit and were undisputed. For summary judgment purposes, they created material issues of fact not resolvable at this point in the proceeding.

We disagree with the dissenting opinion that the weight of authority in other jurisdictions is contrary to this holding. *Shpilberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 535 S.W.2d 227 (Ky.1976) is the only case which suggests that the terms of a written confirmation are absolutely binding on the parties, drawing on an extension of the parol evidence rule. *Shpilberg* completely ignores the express code comments and other authorities dealing with these provisions. Further, *Shpilberg* recognizes that even though the terms of the contract are set conclusively by the confirmation, a party still may raise defenses to it. It says a defending party may "attack only on the grounds which a written contract may be attacked." *Id.* 535 S.W.2d at 230. Surely that would include a defense of lack of authority. [Footnote omitted]

Accordingly, we reverse and remand this cause for further proceedings.

REVERSED AND REMANDED.

Problem 13-3

Holly, looking to purchase a refrigerator, visits Kitchens-R-Us on July 1 to see if they have refrigerators that would fit her needs. Holly finds the perfect refrigerator for $850 and offers to purchase it for $800 to see if she can get a better deal. The sales manager at Kitchens-R-Us responds to Holly's offer and says, "I'll sell you the refrigerator for $800 since we need to make room for newer models." The agreement prices the refrigerator at $850. Holly pays $800 for the refrigerator a few moments later and the refrigerator was delivered to her home on July 4. On delivery, Holly is handed an invoice requiring her to pay an additional $50 for the price of the refrigerator. What is the likelihood that Holly can be forced to pay the additional $50 if she keeps the refrigerator even as she argues that the parties agreed to a $50 reduction?

Problem 13-4

Same general facts as Problem 13-3, except Holly manufacturers and distributes refrigerators, and Kitchens-R-Us sends Holly a letter which she receives on July 3 outlining their purchase agreement. Does this sale comply with the Statute of Frauds? Why or why not? What if Kitchens-R-Us sent this letter on August 1? *See* FLA. STAT. 672.202(2) (2017).

(2). Modifications

It is unique that whereas modifications to sale-of-goods contracts do not need consideration to be binding, *see* U.C.C. § 2-209(1); FLA STAT (2017) 672.209(1), unless an agreement otherwise requires modifications/alterations in writing, *see* U.C.C. § 2-209(2); FLA STAT (2017) 672.209(2), these must be in writing if either the underlying contract equals or exceeds $500 in value, or if the modification causes the total value to meet or exceed this amount. One would think that drafters of multiple choice questions have this little tool in their arsenals.

(3).Other Exceptions to the U.C.C. Article 2's Statute of Frauds

There are several other exceptions to the statute of frauds writing requirement, all of which are logically justifiable. First, certain goods are so special of manufacture that the orderer and the existence of the order are not suspect. Second, if a party admits "in open court" so to speak, to the formation of a contract, then there is record evidence of its formation to counter any misgivings about its authenticity. Third, if either party has fully performed, such party cannot thereafter deny a contract's existence.

671.102 Purposes; rules of construction; variation by agreement.—

* * *

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable:

(a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) If the party against whom enforcement is sought admits in his or her pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods for which payment has been made and accepted or which have been received and accepted.

There is another U.C.C. Article 2 exception to the writing requirement: modifications of sale-of-goods contracts, unless such kind of modification is prohibited by the original contract of sale (e.g., by an "amendment or modification only by a signed writing" clause). *See* FLA. STAT. § §§ 672.209(1)-(2) (2017).

F. Special Case: Promise to Answer for Debt, Default, or Miscarriage of Another

---

ALLEN v. ROSEN

District Court of Appeal of Florida, Third District, 1988

526 So. 2d 1050

DANIEL S. PEARSON, Judge.

Allen and Schreiber, the plaintiffs below, appeal from an order dismissing with prejudice their complaint on the ground that their action was one based on an oral agreement to answer for the debt of another and, because not in writing, barred by the statute of frauds. We reverse.

The following are the pertinent allegations of the complaint. The plaintiffs, Allen and Schreiber, and the defendant, Rosen, were officers, directors, and shareholders of an incorporated travel business being managed by Rosen. When the company needed to borrow funds, Rosen approached his friend Anita Brulz, who agreed to lend the company money on the condition that the individuals guarantee the loan. Allen, Schreiber, and Rosen agreed with each other that they would guarantee the loan and that, in the event the company defaulted on the note, each would be liable for one-third of the obligation. Allen and Schreiber signed the guaranty and gave the note to Rosen for his signature and delivery to Brulz. Rosen delivered the note to Brulz but without his signature. The company went out of business and defaulted on the note; Brulz sought payment from Allen and Schreiber as guarantors; and, when Rosen refused to pay his share of the obligation, Allen and Schreiber brought the action below.

Rosen relies upon the following provision of the Statute of Frauds, Section 725.01, Florida Statutes (1985):

> "No action shall be brought whereby to charge ... the defendant upon any special promise to answer for the debt... of another person ... unless the agreement or promise upon which such action shall be brought ... shall be in writing and signed by the party to be charged therewith...."

While it is true that Rosen's agreement with Allen and Schreiber was to answer for the debt of their company, his promise was made to Allen and Schreiber, not, as it must be to come within the statute of frauds, to the creditor, Brulz. 3 W. Jaeger, *Williston on Contracts* § 460, at 389 (3d ed. 1960); Restatement (Second) of Contracts § 123 (1981) ("A contract to discharge a duty owed by the promisee to a third person is not within the Statute of Frauds as a contract to answer for the duty of another."); *Danby v. Osteopathic Hospital Ass'n,* 34 Del.Ch. 172, 101 A.2d 308 (1953), *aff'd,* 34 Del.Ch. 427, 104 A.2d 903 (1954) (promise by president of association to guarantee bank loan not within statute of frauds where promise made to association, not bank). *See also Herrin v. Abbe,* 55 Fla. 769, 46 So. 183 (1908). As Professor Corbin tells us:

> "To fall within the statute, a promise must be made to a creditor or obligee to whom the third person is then or later becomes under obligation. A promise to a debtor to pay or otherwise answer for his debt or default to a third person is not within the statute. Thus, where Eastwood was indebted to Blackburn on a promissory note, and Kenyon promised Eastwood to pay Blackburn the sum due, Kenyon's promise was enforceable even though not in writing. Where Davis was indebted to a bank, and Faulkner promised Davis to pay the bank, Faulkner's promise was not within the statute."

2 A. Corbin, *Corbin on Contracts* § 357, at 241-43 (1950) (footnotes omitted).

And, as if with this case in mind:

> "Where a number of persons undertake, either jointly or jointly and severally, to pay a sum of money to their promisee, it is not uncommon for the obligors to agree among themselves as to the particular portion of the whole that each will pay. The promise of one such obligor to the others that he will pay his specified share is not required to be in writing.... [T]he promise is made to a debtor and not to a creditor; ..."

2 A. Corbin, *Corbin on Contracts* § 357, at 246-47 (1950) (footnote omitted).

Therefore, because Rosen's promise was to the debtors Allen and Schreiber, not the creditor Brulz, it is enforceable even though not in writing, and the plaintiff's complaint states a cognizable cause of action.

Reversed and remanded.

Notes

1. Readers may recall from Chapter VII that more progressive jurisdictions have carved out an exception to the *moral obligation*s problem regarding legal sufficiency of consideration.

2. Hopefully, readers have made the connection that the first five main categories of Statute-of-Frauds concerns is the mnemonic behind the website www.mylegs..org.

3. Other State-Specific Categories

In addition to the general Statute of Frauds categories laid out in Sections B and C, readers should be aware of other categories of contracts that require writings. Readers should consider consulting their respective jurisdiction's statute for the specific requirements. This section will very briefly address Florida-specific contracts other U.C.C. Article 2 contracts that require a writing for enforcement. *See* FLA. STAT. (2017) § 725.01 *et seq.* In Florida, the rules capture long-term newspaper subscriptions (which it is easy to imagine was rife with fraud at some point in Florida's history).

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 13

1. Contracts: elements, requirements, in writing
2. The difference between enforcement and formation
3. MYLEGS.com and other unique, state specific forms
4. Interlocutory appeals

SUGGESTED EXERCISE(S)

1. Have students, individually or in small groups, locate the “Statute of Frauds” provisions in other states. Ask for a report on any that are not contained in this Chapter.

2. To confirm understanding of two of the more obscure situations falling under the Statute of Frauds, have students create short scenarios demonstrating contracts with executors and contracts of guarantee.

CHAPTER 14: INTERPRETATION

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The preceding thirteen Chapters have established the framing of contract law by starting with formation and ending with damages while providing, at least briefly, the main thing that connects the two: breach. There are a host of issues in between, and the remaining Chapters will cover the most important, and therefore, the most testable ones. After formation but before breach, the main issues are contract interpretation (which includes integration),

conditions (and the substantial performance doctrine), rules on involving third parties in the performance of contracts (third party beneficiary rules, assignments of rights, and delegation of duties), and then defenses to contract enforcement (which avoid the finding of breach and damages).

Often, terms and conditions that apply to a contract are obscure and need to be clarified. The overriding goal is to identify and enforce the intent of the parties, and there are several tests that courts use to do so. The authors will suggest a hierarchical framework for applying these tests although review of case law indicates a noteworthy failure of courts to sanctify this hierarchical framework despite its obvious and logical merit. Fortuitously, with only one or two complications, the same hierarchy applies as well to the question of integration as it does to issues of interpretation.

It is perhaps interesting to note that many national casebooks address the issue of *integration* before that of *interpretation*. There is a good reason for this – in order to determine whether the parties are working under the complete agreement, the question of integration must be answered. For example, are prior discussions, perhaps via email message, part of the bargain between parties even if they do not appear in the final written manifestation of the parties' bargain? In other words, were items discussed prior to finalization intended to be included in the agreement, or were they merely preliminary negotiations that were intended to be disregarded? However, the integration question is a question of interpretation, i.e., did the parties intend for prior or contemporaneous items of negotiation to be included? Where it was otherwise not clear? Or was the intent of the final agreement to exclude such things in favor of only those items included in the final writing? Because the integration question is one of the parties' intent, it is one of interpretation. Breaking with tradition, this casebook commences with interpretation (consideration of potentially ambiguous terms in an agreement), followed by at least two of the most common interpretation issues: (1) whether a contract is integrated such that prior or contemporaneous other negotiations are excluded; and (2) whether the language of a contractual requirement is one of condition or of promise. There are of course other issues of interpretation for ambiguous terms. A few examples of the myriad others include whether the last day of the month means "the last work day of the month" or the last day of the month even if it falls on a weekend. A manufacturer delivering a shipment on a Saturday, which is the last day of the month, may be in breach of the agreement if the delivery term is interpreted to be "the last working day of the month" (i.e., Monday through *Friday*). Another example would be whether the term "red" in a final contract means the "red" used for a product in last year's brochure reviewed by the buyer, or whether it means the "red" color that a manufacturer is using at the time of contracting. Where the prices for the colors vary significantly, a lot of money can be won or lost depending on the outcome.

Although the topic may be a bit sensitive, it may be important to understand up front that there are significant 'political' considerations within the machinations of contract interpretation. Courts decide questions of interpretation,[32] and to the extent that there is some flexibility in picking one over another interpretation rule, courts are in the position to favor one meaning over another based on their inclinations. The authors believe that this is a reason why very few if any courts have squarely addressed the hierarchical framework mentioned earlier. The more defined a hierarchy of rules is, the less wiggle room a court has to effectuate personally held policy obscured by reliance on a particular rule of construction. This is not necessarily a detriment; some policies that flavor a court's interpretation include the laudable intention to avoid serious forfeitures by one contractual party or to temper a condition imposing an obligation with a requirement to do so in good faith. To demonstrate the point that courts tend not to squarely address the logical hierarchy, one need only compare the concurrences in the very first case below, *Penzer v. Transportation Ins. Co.*, which pits the first test set out below against the third.

CMM Approach: For interpretation, and with some modification for the question of integration, it is suggested to work with the hierarchical framework that follows. It begins not with a test or a rule, but with the goal of interpretation. What follows are several tests that courts use, organized from an evidentiary standpoint from the least extrinsic to the most extrinsic. If the final writing is the first and best manifestation of the parties' contractual intent, then the tests used to determine it should try to avoid the use of evidence outside of, or *extrinsic to*, such writing. It is important to recognize that the lack of clear hierarchy leads to some overlap between categories.

The goal is to determine the intent of the parties. (If it is clear, courts often stop here). The tests:

	RULE	**LEVEL**
1	*Plain meaning* of word or phrase (supplemented by use of a dictionary)	Intrinsic to the word or phrase
2	Interpreting the meaning from within the *four corners* of the document	Intrinsic to the document

[32]

3	*Other rules of construction* (wise rules of contract law used as canons)	More extrinsic
4	*Holistic* or *mélange* approach (Rest. (Second) and U.C.C. Article 2)	Very extrinsic
(5	When all else fails, let the jury decide)	Very extrinsic[33]

1. The Plain Meaning Rule

Florida case law is not fully clear on the distinction between categories 1 (plain meaning) and 2 (interpretation within the four corners). Technically, these may also be referred to as *rules of construction*. Typically, the first two tests (or rules) from the chart above are addressed in tandem, and the ultimate ruling is made based on the conglomeration of both. It is argued that each is a separate basis, and that either would justify a ruling if true (but perhaps in hierarchical order). Nevertheless, practitioners need to be aware of this conglomeration of tests. An example or two of the conglomeration will be set out in Section B below. Problems 14-1 and 14-2 will hopefully drive home the distinction. Additionally, Florida courts sometimes utilize the plain meaning rule but bolster it by adding other *rules of construction* addressed in Section C below. Apparently, two distinct legal bases to support a ruling are better than one.

PENZER 5. TRANSPORTATION INS. CO.

Supreme Court of Florida, 2010

29 So. 3d 1000

POLSTON, J.

This case is before the Court for review of a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit that is determinative of a cause pending in that court and for which there appears to be no controlling precedent. [Footnote omitted]

The coverage issue in this insurance dispute concerns whether, under Florida law, the sending of an unsolicited advertisement by fax, in violation of the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C.A. § 227 (2001), is covered by a particular insurance policy provision.

The Eleventh Circuit certified the following question:

33

> Does a commercial Liability Policy Which Provides Coverage for "Advertising Injury," Defined as "Injury Arising out of ... Oral or Written Publication of Material That Violates a Person's Right of Privacy," Such as the Policy Described Here, Provide Coverage for Damages for Violation of a Law Prohibiting Using Any Telephone Facsimile Machine to Send Unsolicited Advertisement to a Telephone Facsimile Machine When No Private Information is Revealed in
> the Facsimile?

Penzer v. Transp. Ins. Co., 545 F.3d 1303, 1312 (11th Cir.2008).

For the reasons that follow, we hold that, under Florida law, the language of this insurance provision provides coverage for infringements of the TCPA. Accordingly, we answer the certified question in the affirmative.

1. BACKGROUND

In June 2003, Michael Penzer filed a class action suit in a Florida state court against Nextel South Corporation alleging that Nextel or one of its agents sent him an unsolicited facsimile advertisement in violation of the TCPA. [Footnote omitted] *Penzer v. Transp. Ins. Co.*, 509 F.Supp.2d 1278, 1280 (S.D.Fla.2007). Nextel filed a third-party complaint against Sunbelt, a blast-fax advertiser, and Southeast Wireless, an authorized agent of Nextel, seeking indemnity and contributions for any liability Nextel may have in the class action. *Id.* Nextel also alleged that Southeast Wireless hired Sunbelt to create the advertisement and that Nextel did not authorize the fax transmissions. *Id.* Penzer then filed a third-party complaint against Southeast Wireless, and Southeast Wireless requested that Transportation Insurance Company ("Transportation"), its commercial liability insurer, defend it in the class action. *Id.* Transportation refused to provide a defense for the class action suit or the Nextel complaint, and also disclaimed any coverage on various grounds. *Id.* at 1281.

Thereafter, in April 2004, Penzer entered into a settlement agreement with Southeast Wireless in which Penzer agreed to release Southeast Wireless from any liability, and Southeast Wireless consented to a judgment and assigned its right to seek insurance coverage from Transportation to Penzer. *Id.* The state court approved the settlement and certified a settlement class. *Id.* Penzer then pursued a declaratory judgment action against Transportation in the United States District Court for the Southern District of Florida, wherein Transportation defended that, based upon the language of the policy, Transportation had no obligation to defend or indemnify Southeast Wireless. *Id.*

The insurance policy at issue here provides coverage for advertising injuries. The policy defines “advertising injury” as an “injury arising out of one or more of the following offenses:”

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan.

Id.

Transportation argued:

> [T]he phrase “oral or written publication of material that violates a person's right of privacy,” read as a whole and in context, provides coverage only for injuries to privacy rights caused by the content of the material. Second, Florida law interpreting the phrase “publication ... in violation of an individual's right of privacy” makes clear that coverage exists only when private matters about one person are communicated to another person. Although Southeast's conduct in having the commercial advertisements sent by facsimile may have violated the TCPA, there is no coverage under the policy because there were no content-based privacy violations.

Id. at 1283.

The Southern District agreed with Transportation. Specifically, it found that Transportation did “not have a duty to indemnify the plaintiffs for Southeast's violations of the TCPA.” *Id*. at 1288. [Footnote omitted] It ruled that the policy language was not ambiguous and that “advertising injury coverage under this provision exists only when the content of the material published violates a person's right to privacy.” *Id*. at 1286. The Southern District declined to adopt the reasoning of the Eleventh Circuit in *Hooters of Augusta, Inc. v. American Global Insurance Co.*, 157 F. App'x 201 (11th Cir.2005), which reached the opposite conclusion under Georgia law, reasoning that (1) “Hooters did not address the main argument made by Transportation here,” and (2) Florida law calls for a different result. 509 F.Supp.2d at 1284. Instead, the Southern District relied on the reasoning of the Third District Court of Appeal in *State*

Farm Fire & Casualty Co. v. Compupay, Inc., 654 So.2d 944 (Fla. 3d DCA 1995), a case holding that an insurer had no duty to defend its insured against a sexual harassment claim under a policy provision that provided coverage for "a publication or utterance in violation of an individual's right of privacy." 509 F.Supp.2d at 1284 (*quoting Compupay*, 654 So.2d at 948).

Penzer appealed the Southern District's decision to the Eleventh Circuit, which concluded that "[n]either the policy exclusions nor Florida public policy lead to denial of coverage." [Footnote omitted] *Penzer*, 545 F.3d at 1311. However, the Eleventh Circuit also found that the disposition of this case rested on an unsettled issue of Florida law and that "[a] pure legal question of the interpretation of widely used language in commercial liability insurance is at issue." [Footnote omitted] *Id*. Accordingly, it certified its question to this Court. *Id*. at 1312.

2. ANALYSIS

This case presents a question of insurance policy interpretation, which is a question of law, subject to de novo review. *See Auto–Owners Ins. Co. v. Pozzi Window Co.*, 984 So.2d 1241, 1246 (Fla.2008).

In interpreting insurance contracts, this Court follows the generally accepted rules of construction, meaning that "[i]nsurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 877 (Fla.2007) (*citing Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 532 (Fla.2005)). "If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, the insurance policy is considered ambiguous." *Garcia v. Fed. Ins. Co.*, 969 So.2d 288, 291(Fla.2007) (*quoting Auto–Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla.2000)). To find in favor of the insured on this basis, however, the policy must actually be ambiguous. *Garcia*, 969 So.2d at 291 (*citing Taurus Holdings*, 913 So.2d at 532). "A provision is not ambiguous simply because it is complex or requires analysis.... '[1]f a policy provision is clear and unambiguous, it should be enforced according to its terms.' " *Garcia*, 969 So.2d at 291 (*citation omitted*) (*quoting Taurus Holdings*, 913 So.2d at 532).

Here, the policy language at issue is, "oral or written publication of material that violates a person's right of privacy." Three terms—"publication," "material," and "right of privacy"—are particularly relevant, and none are defined by the policy. Consequently, the first step towards discerning the plain meaning of the phrase is to "consult references [that are] commonly relied upon to supply the accepted meaning of [the] words." *Garcia*, 969 So.2d at

292 (*citing Gov't Employees Ins. Co. v. Novak*, 453 So.2d 1116, 1118 (Fla.1984)).

The first term, “publication” is defined as “communication (as of news or information) to the public: public announcement” or as “the act or process of issuing copies (as a book, photograph, or musical score) for general distribution to the public.” Webster's Third New International Dictionary 1836 (1981). The definition also refers the reader to the definition of “publish.” *Id*. To publish is “to place before the public (as through a mass medium): DISSEMINATE.” *Id*. at 1837. Here, sending 24,000 unsolicited blast-facsimile advertisements to Mr. Penzer and others is included in the broad definition of “publication” because it constitutes a communication of information disseminated to the public and it is “the act or process of issuing copies ... for general distribution to the public.”

“Material” has several definitions, two of which are “of, relating to, or consisting of matter,” and “something (as data, observations, perceptions, ideas) that may through intellectual operation be synthesized or further elaborated or otherwise reworked into a more finished form or a new form or that may serve as the basis for arriving at fresh interpretations or judgments or conclusions.” *Id*. at 1392. In this case, the faxed paper containing the unwanted advertisement meets the definition of “material” since a faxed advertisement “consist[s] of matter,” and “something that may ... be synthesized or further elaborated or ... may serve as the basis for arriving at fresh interpretations or judgments or conclusions.”

A “right” is “something to which one has a just claim” or “something that justly accrues or falls to one: something that one may properly claim: one's due.” *Id.* at 1955. This plain meaning of “right” invokes the legal authority one must possess in order to assert a proper claim.

Because the policy provides coverage for a violation of a “right of privacy,” which can only arise from the law, it is not necessary to separately discern the plain meaning of “privacy.” If “privacy” was not preceded by “right of” then the dictionary definition of “privacy” would be relevant under a plain meaning analysis. Stated another way, the plain meaning of “right of privacy” is the legal claim one may make for privacy, which is to be gleaned from federal or Florida law, rather than defined by a dictionary. In this case, the source of the right of privacy is the TCPA, which provides the privacy right to seclusion. *See Valley Forge*, 307 Ill.Dec. 653, 860 N.E.2d at 315 (“The receipt of an unsolicited fax advertisement implicates a person's right of privacy insofar as it violates a person's seclusion, and such a violation is one of the injuries that a TCPA fax-ad claim is intended to vindicate.”); *Hooters*, 157 F. App'x at 206 (“[T]he findings accompanying the TCPA legislation illustrate that Congress was expressly concerned about protecting privacy interests.”); *Park Univ.*, 442 F.3d at 1249 (“Courts have consistently held the TCPA protects a species of

privacy interest in the sense of seclusion. ‘Looking at how Congress described unsolicited fax advertisements, it is clear that Congress viewed violations of the Act as ‘private nuisances' and ‘invasions of privacy’ under ordinary, lay meanings of these phrases.' ”) (*quoting Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 881(8th Cir.2005)); *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 639 (4th Cir.2005) (“[T]he harm occasioned by unsolicited faxes involves protection of some sort of ‘privacy.’ ”); *W. Rim*, 269 F.Supp.2d at 847 (“The stated purpose of the TCPA ... is to protect the privacy of individuals from receiving unsolicited faxed advertisements.”) (*citing Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1150 (4th Cir.1997)).

As stated previously, the policy provision provides coverage for a written publication of material that violates a person's right of privacy. The facts of the instant case demonstrate that there was a written dissemination of 24,000 facsimiles that violated the TCPA. Comparing the policy's language to [the facts of this case]: there was a written publication [dissemination] of material [of 24,000 facsimiles] that violated a person's right of privacy [that violated the TCPA]. Therefore, applying our plain meaning analysis, we hold that Transportation's insurance policy provides coverage for sending unsolicited fax advertisements in violation of the TCPA.

Transportation argues that the doctrine of the last antecedent, a grammar-based canon of statutory construction, should apply. According to the doctrine of the last antecedent,

> “relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote.” *City of St. Petersburg v. Nasworthy*, 751 So.2d 772, 774 (Fla. 1st DCA 2000). The last antecedent is the “last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.” 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47.33 (7th ed.2007).

Kasischke v. State, 991 So.2d 803, 811 (Fla.2008). Therefore, Transportation contends that the phrase “that violates a person's right of privacy,” as written in the policy provision, modifies the term “material,” as opposed to “publication,” and thus can only apply when the content of the material violates a person's right of privacy. Accordingly, Transportation urges, only a violation of the secrecy right of privacy will trigger coverage, not a violation of seclusion. We disagree.

First, the doctrine of the last antecedent is not an absolute rule. *See United States v. Hayes*, 555 U.S. 415, ––––, 129 S.Ct. 1079, 1086, 172 L.Ed.2d 816 (2009) ("The rule of the last antecedent ... 'is not an absolute and can assuredly be overcome by other indicia of meaning.' ") (*quoting Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003)); *Fortune Ins. Co. v. Dep't. of Ins.*, 664 So.2d 312, 316 (Fla. 1st DCA 1995) ("This rule of statutory construction ... is not controlling or inflexible.") (*quoting* 73 Am.Jur.2d, Statutes § 230 (1995)). And the doctrine cannot be applied in a way that ignores the plain reading of the language. "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Fortune Ins.*, 664 So.2d at 316 (*quoting Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920)). Here, as in Fortune Insurance, we find that the clause "that violates a person's right of privacy" is applicable as much to "publication" as to "material;" therefore, the clause should be read as applicable to all. Accordingly, we reject Transportation's assertion that the violation must arise from the content of the material in order to trigger coverage.

Furthermore, even if the phrase "that violates a person's right of privacy" only modifies the term "material," it does not follow that only the secrecy right to privacy is implicated because "material" could also invade one's seclusion. *See Motorists Mut. Ins. Co. v. Dandy–Jim, Inc.*, 182 Ohio App.3d 311, 912 N.E.2d 659, 666 (2009) (" 'The Act presumes that all advertising, so long as it is unsolicited, is an offensive intrusion into the recipient's solitude.' In other words, the unsolicited faxed advertisement itself is the 'material' that is offensive and violative of the individual's right of privacy." (*quoting TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238 (Tex.App.2004))) (*citations omitted*); *see also Terra Nova*, 869 N.E.2d at 573 ("On its face, the use of the phrase 'right of privacy' does not evince a plain meaning that is limited in the manner in which the insurers contend."); *Valley Forge*, 307 Ill.Dec. 653, 860 N.E.2d at 316 ("[A] violation of privacy in the sense of a violation of seclusion is implicit in a TCPA fax-ad claim."). Accordingly, we reject Transportation's argument that the doctrine of the last antecedent requires a different plain reading of the policy. [Footnote omitted]

3. CONCLUSION

Based upon our plain meaning analysis, we hold that an advertising injury provision in a commercial liability policy that provides coverage for an "oral or written publication of material that violates a person's right of privacy" provides coverage for blast-faxing in violation of the TCPA. We therefore answer the certified question in the affirmative.

It is so ordered.

QUINCE, C.J., and LEWIS, LABARGA, and PERRY, JJ., concur.

PARIENTE, J., concurs in result only with an opinion, in which CANADY, J., concurs.

CANADY, J., concurs in result only with an opinion.

PARIENTE, J., concurring in result only.

Regardless of whether the insurance policy is read as clearly providing coverage as the majority concludes or whether the policy is ambiguous as Justice Canady concludes, the answer to the certified question is in the affirmative. The reason for that alternative answer based on an ambiguity in the policy language is that this Court construes ambiguous provisions in favor of the insured. Rather than deciding this case on the "plain language" as the majority does, 1 would acknowledge the existence of two reasonable interpretations but then, in accordance with the rules of construction for insurance policies, apply the interpretation in favor of coverage.

As stated by Justice Canady in his separate opinion in this case, this Court follows the rule that "[a]mbiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured." *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082, 1086 (Fla.2005). If there are two competing reasonable interpretations, one favoring coverage for the insured and one denying coverage for the insured, courts uniformly adopt the interpretation conferring coverage. *See Container Corp. of Am. v. Md. Cas. Co.*, 707 So.2d 733, 735–36 (Fla.1998).

The reasoning for this long-established principle is that the insurer, as drafter of the policy language, has an obligation to make the scope of its coverage and any limitations from coverage clear and unambiguous in the actual language of the policy. As we recently stated in *United States Fire Insurance Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 884 (Fla.2007), if the insurer "intended to preclude coverage based on the cause of action asserted, it was incumbent on [the insurer] to include clear language to accomplish this result."

The insurer in this case has contended that the wording of the policy provides coverage for situations where the content of the material-and not the act of sending it—violates a person's right of privacy. While that is one reasonable interpretation of the policy, it is not the only reasonable interpretation. 1 agree with the rationale of the Supreme Judicial Court of Massachusetts in interpreting New Jersey law on the same policy provisions defining advertising injury:

> Although we are aware that "[a]n insurance policy is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants," in evaluating the ambiguity of the phrase, we cannot ignore the body of national case law addressing the same or similar policy language and falling on both sides of this interpretive ledger. It is fair to say that even the most sophisticated and informed insurance consumer would be confused as to the boundaries of advertising injury coverage in light of the deep difference of opinion symbolized in these cases.

Terra Nova Ins. Co. v. Fray–Witzer, 449 Mass. 406, 869 N.E.2d 565, 573 (2007) (*citation and footnote omitted*) (*quoting Powell v. Alemaz, Inc.*, 335 N.J.Super. 33, 760 A.2d 1141, 1147 (Ct.App.Div.2000)). The ambiguity, in my view, arises because the policy language is unclear as to whether the phrase "violates a person's right of privacy" refers to the publication of the material or the material itself.

The bottom line is that if the insurer, as the drafter of the language, intended to limit coverage to material whose content violated the right of privacy, then it could have easily done so by simply adding a phrase as follows: Oral or written publication of material, the content of which violates the right of privacy. Transportation Insurance Company did not do so and thus left the policy open to a reasonable interpretation in favor of coverage. *See Terra Nova*, 869 N.E.2d at 574 ("[H]ad [the insurers] wished their policies to pertain only to violations of privacy created by the content of material, it was incumbent on them to draft explicit policies to that effect.").

For all of these reasons, 1 agree with the majority's conclusion that insurance coverage should be extended and agree with answering the certified question in the affirmative.

CANADY, J., concurs.

CANADY, J., concurring in result only.

Although 1 agree that the certified question should be answered in the affirmative, 1 do not concur in the majority's conclusion that the policy provisions at issue are unambiguous. Instead, 1 conclude that the resolution of the question presented by this case is dictated by the rule that "[a]mbiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured." *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082, 1086 (Fla.2005).

The clause at issue provides coverage for advertising injuries arising from "[o]ral or written publication of material that violates a person's right of

privacy." An ordinary reader of this clause would reasonably be in doubt concerning whether the violations covered by the clause must be based on the informational content of the material that is published or may be based on the physical intrusion of the material.

The existence of two different senses in which the noun "material" is commonly used contributes to the ambiguity. One sense of "material" denotes a physical object: "[t]he matter of which a thing is or may be made." 1 Shorter Oxford English Dictionary 1723 (6th ed.). This sense of the term has nothing to do with informational content. Another sense of "material" is used to identify "[i]nformation, evidence, ideas, etc., for use in writing a book or script, drawing a conclusion, etc." *Id.* at 1724. This sense of the term has everything to do with informational content.

The ambiguity is compounded by the existence of two senses in which the noun "publication" is commonly used. "[P]ublication" may denote "[t]he action of making something generally known"—a definition which points to informational content. 2 Shorter Oxford English Dictionary 2395 (6th ed.). The term also may denote "[t]he process of producing and issuing ... printed or reproduced matter"—a definition which focuses on the physical object disseminated. *Id.*

When reference is made to a "written publication of material that violates a person's right of privacy," an ordinary reader will not—unless sufficient contextual clues are present—understand with certainty whether the reference is to a violation caused by the intrusion of the writing as a physical object, by the informational content of the writing, or by either. The relevant context here does not provide an ordinary reader with a sufficient basis for rejecting the reasonable possibility that "written publication of material" denotes the physical object received when a fax transmission is disseminated and that the policy therefore covers privacy violations based on the intrusion of such a physical object. Neither does the context provide adequate grounds for rejecting as unreasonable a reading which limits the meaning of "written publication of material" to information or ideas—that is, to the informational content that is published and causes a privacy violation.

Given the different relevant senses in which "material" and "publication" are commonly used and the lack of a sufficient contextual basis to guide the ordinary reader to an unequivocal meaning of the policy provision, the plain meaning rule does not provide a persuasive basis for deciding the question presented here. Since the reading of the policy advocated by Penzer, the insured, is not a reading that an ordinary reader would reject as unreasonable, Penzer's reading must prevail.

Problem 14-1

Smith Engines contracted with Jones Nuts-n-Bolts for "1,500 lbs. of titanium metal screws." Jones Nuts-n-Bolts shipped 1,500 lbs. of screws made of a new metal alloy called "Trinitium®," which is a new alloy that adds a new chemical element which makes the screws lighter, stronger, and cheaper. Unfortunately, the new chemical element in Trinitium corrodes the metal used by Smith Engines. When Smith Engines rejects the shipment, Jones Nuts-n-Bolts sues for wrongful rejection. Jones Nuts-n-Bolts argues that customers typically expect quality products, not necessarily actually made from the metal specified – thus, use of Trinitium was acceptable and within the contemplated bargain between the parties. Smith Engines argues that titanium has a single and unique chemical composition that no one would mistake. Who wins, and why? Who decides this question?

2. Working Within the Four Corners of the Document

The most famous advocate of the *four corners* test, which is restrained rather than a liberal rule about what may be used to interpret ambiguous terms, is Professor Williston from Harvard Law School. As many casebooks suggest, Professor Williston's old-school, conservative approach to contract law, including interpretation of ambiguous terms, stands in opposition to a more open, liberal, holistic approach espoused by the likes of Yale Law School's Professor Corbin. More about Professor Corbin in Section D which follows. This is also an opportune point to indicate how these rules apply to different types of contracts. The three that follow are representative only.

A. Contracts Creating a Trust

_IN RE_ ESTATE OF BARRY

District Court of Appeal of Florida, Fourth District, 1997

689 So. 2d 1186

STONE, Judge.

We affirm a final summary judgment entered in favor of the beneficiary of an irrevocable inter vivos trust, and reject claims seeking to modify the clear and unambiguous terms of the trust.

The heirs of the settlor brought this action to recover the balance in the trust. The heirs claim that Appellee, the trust's beneficiary, breached an alleged agreement with her mother, the settlor, not to sue Appellee's siblings in a corporate shareholder dispute. Appellants claim that the sole reason for the mother settling the trust was to protect Appellee's interest in the estate as security for payment of sums due Appellee under the shareholder dispute settlement. Appellants charge that Appellee nevertheless instituted suit nine years later-some seven months prior to the settlor's death. Appellants assert that the alleged agreement not to sue was the consideration for the mother establishing the trust. Because Appellee allegedly breached this agreement not to sue her siblings, Appellants claim a right to undistributed income left in the trust. The only written evidence of the alleged agreement is a letter from Appellants' attorney to Appellee's attorney five months prior to the mother establishing the trust. However, neither Appellee nor her mother wrote or signed this letter, or possibly even knew about it.

The settlor established in article 2 of the trust that:

> The Trust created hereby shall be irrevocable and the Grantor expressly waives all rights and powers, whether alone or in conjunction with others, and regardless of when or from what source she may heretofore or hereafter have acquired such rights or powers, to alter, amend, revoke or terminate this Trust or any of the terms of this Trust Agreement in whole or in part.

The trust also provides:

> A. The Trustees ... shall pay over to the Grantor, or apply for her benefit, the entire net income in convenient installments, not less often than quarterly.
>
> * * * * * *
>
> C. Upon the death of the Grantor, the entire principal and undistributed income of this Trust shall be distributed outright and free of this Trust to the Grantor's daughter, SANDRA E. BARRY, and this Trust shall terminate.

The trial court found that the trust was unambiguous and fully integrated. The parol evidence rule thus precluded testimony concerning any alleged prior or contemporaneous agreement not referred to within the four corners of the document that would serve to vary, contradict, add to, subtract from, or alter the terms of the document. There is nothing in the language of the document that can be reasonably construed as conditional. The court also recognized that the settlor had the legal discretion to leave undistributed income in the trust for the beneficiary.

Clearly, the parol evidence rule bars claims arising out of prior extrinsic agreements, oral or written, which the terms of a fully integrated document. *E.g. J.M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So.2d 484 (Fla.1957); *J.C. Penney Co. v. Koff*, 345 So.2d 732 (Fla. 4th DCA 1977); *Burgan v. Pines Co. of Georgia, Ltd.*, 382 So.2d 1295, 1296 (Fla. 1st DCA 1980). Admission of such evidence absent an ambiguity is precluded even without reference to the parol evidence rule. *Knauer v. Barnett*, 360 So.2d 399 (Fla.1978). Where the terms of an agreement, as here, are unambiguous, its meaning and the intent of the maker are discerned solely from the face of the document, as the language used and its plain meaning controls. *Fecteau v. Southeast Bank, N.A.*, 585 So.2d 1005 (Fla. 4th DCA 1991).

Appellants in the instance case are attempting to nullify or revoke an existing trust agreement because Appellee allegedly breached a condition subsequent, i.e., not to sue her siblings. Parol evidence cannot be introduced to show this alleged breach or failure of a condition subsequent. Although parol evidence is admissible to show conditions precedent, which relate to the existence of a valid contract, such evidence is not admissible to show conditions subsequent, which provide for the nullification or modification of an existing contract. *Chappell v. Hasche*, 98 So.2d 808 (Fla. 2d DCA 1957).

We have considered the several exceptions to the rule raised by Appellants and find each inapposite, as exceptions recognizing the introduction of extrinsic evidence are inapplicable to contradict the express terms chosen by the settlor. *See Federal Deposit Ins. Corp. v. Hemmerle*, 592 So.2d 1110 (Fla. 4th DCA 1991); *J.M. Montgomery Roofing*; *Linear Corp. v. Standard Hardware Co.*, 423 So.2d 966 (Fla. 1st DCA 1982). The face of the document clearly provides that Appellee's interest is unconditional and the settlor expressly "waive(d) all rights and powers ... to alter, amend, revoke or terminate this trust." Nowhere in the document is there even a hint of obligation on the part of Appellee. We also reject the applicability of law allowing parol evidence to demonstrate the "true consideration" for an agreement. *See Schwartz v. Zaconick*, 68 So.2d 173 (Fla.1953); *Mallard v. Ewing*, 121 Fla. 654, 164 So. 674, 678 (1935). The "true consideration" exception is only applicable to clarify an ambiguous document. Schwartz. Here, as a matter of law, the document is unambiguous. *See Schwartz; Gorman v. Kelly*, 658 So.2d 1049 (Fla. 4th DCA 1995). Recognizing a "true consideration" exception to every motive that may prompt one to execute a document would truly be an exception that swallows the rule. *See Knabb v. Reconstruction Finance Corp.*, 144 Fla. 110, 197 So. 707 (1940); *Florida Moss Products Co. v. City of Leesburg*, 93 Fla. 656, 112 So. 572 (1927); *Asphalt Paving, Inc. v. Ulery*, 149 So.2d 370 (Fla. 1st DCA 1963).

Neither is this, as alleged, simply a circumstance of multiple agreements that are bound together as "two aspects of the same transaction," where neither of

the documents contain the full embodiment of an agreement. *See Barker v. First Nat. Bank in Plant City*, 325 So.2d 467 (Fla. 2d DCA 1976) (parol evidence is admissible to connect several written instruments and to show that they were all part of one transaction). Here, the trust is patently complete on its face with no essential terms absent. In addition, there must be some expression in the incorporating document of an intention to be bound by a collateral document. *Kantner v. Boutin*, 624 So.2d 779, 781 (Fla. 4th DCA 1993).

It is also worth noting that the settlor was not a party to the correspondence between the attorneys which formed the alleged agreement. Furthermore, the trust was recognized by the settlor until her death despite the fact that her daughter sued her siblings more than half a year before her death. *Cf. Kantner; Leaseco, Inc. v. Bartlett*, 257 So.2d 629 (Fla. 4th DCA 1971), *cert. denied*, 262 So.2d 447 (Fla.1972). We also note an absence of proof of fraud on Appellants' claim that it is inequitable to permit Appellee to retain the benefits of a fraudulent inducement.

We find no merit in the argument that the settlor lacked the discretion to pass undistributed income through the trust. The document provides that Appellee receives the undistributed income remaining in the trust. *Knaur*.

Therefore, the judgment is affirmed.

Note

The *In re Barry* case addresses the parol evidence rule, which is covered in detail in Chapter 16. We suggest using the term “parol evidence” in the context of the integration question, and “extrinsic evidence” when dealing with the interpretation question. Whereas “integration” addresses what items are in the contract and what are not in (prior emails, brochure representations, etc.), the “interpretation” question addresses what things that are already in an agreement may mean. This is a distinction of reasonable importance and is worthy of brief explanation. Stated another way, the integration question determines whether things outside the final writing of an agreement are nevertheless included (i.e., “parol evidence”) – consistent additional terms may be allowed even when they are not found in the last agreement. Where all of the terms of the agreement are established, the interpretation question determines what ambiguous terms, already determined to be in the final agreement and not excluded, mean. In some cases, outside or extrinsic evidence may be used to explain (as an explanation of an included term, not as a new term to be included in the agreement). Stated another way, the first deals with inclusion and the second deals with explanation.

BURNS v. BARFIELD

District Court of Appeal of Florida, Fourth District, 1999

732 So. 2d 1202

HAZOURI, J.

Stanley and Eileen Burns (the Burnses) appeal from final judgment entered upon a jury verdict rendered in favor of Daniel Barfield (Barfield) on a claim by Barfield against the Burnses for breach of a shareholders' agreement.

The Burnses raise five points on appeal. The first is that the trial court erred in denying the Burnses' motion for directed verdict as to the breach of the shareholders' agreement. We agree and reverse for entry of a directed verdict in favor of the Burnses. Therefore, we need not address the remaining points on appeal.

In 1988 the Burnses, Barfield, Jean Lacerte (Lacerte) and Edward Irwin (Irwin) became involved in a business venture to build an adult congregate living facility (ACLF) on property owned by the Burnses. The original investment in the ACLF venture was $850,000. The venture took an option on the property owned by the Burnses, and they received 10 % interest on the value of the land throughout the entire project. After a few years with limited progress, the investors abandoned the ACLF project and embarked upon a townhouse venture.

In May of 1991, a corporation known as 14th Street, Inc. was formed in order to develop townhouses. The Burnses, Barfield, Lacerte, and Irwin each possessed a 23% interest (2,300 of 10,000 shares) in 14th Street, Inc., with 6% reserved to Jocelyn Lacerte and 2% to Debra Tamasi. The shareholders entered into an agreement which placed the following restrictions on the 14th Street, Inc. stock:

> 1. The shares of stock held by each of the parties hereby shall be freely transferable to surviving joint tenant or tenant by the entireties, a trustee of an inter vivos or testamentary trust, personal representative of an estate, or the heirs and beneficiaries under a Last Will and Testament of the previous owner of said shares of stock.
>
> 2. In the event that any shareholder desires to sell his or her shares of stock, the selling shareholder shall offer to sell his or her interest in the shares of stock to all the other shareholders on the

same terms as are contained in a bona fide written *offer made by a third party purchaser whose name and address must be stated in said offer*. In the event that more than one shareholder wishes to purchase the interest of the selling shareholder, said purchasers shall share in the same ratio as their existing percentage of shares held by each of them bear to one another.

3. The shareholder desiring to sell his or her shares shall give notice in writing of his or her intention to sell said shares together with the materials described above to each of the other shareholders of the corporation by United States certified mail, postage prepaid. The remaining shareholders shall have thirty (30) days from date thereof in which to purchase said interest from the selling shareholder, pursuant to the terms and conditions of the contract offer made by the third person wishing to purchase said shares. The purchasing shareholder shall notify the selling shareholder by notice in writing by United States certified mail, postage prepaid, on or before the thirtieth (30th) day said notice period has expired. The mailing of said acceptance within said thirty-day period shall be considered as sufficient in compliance with said offer by the selling shareholder. The purchasing shareholder or shareholders shall, in that event, carry out the purchase of said stock in accordance with the offer originally submitted.

4. In the event that none of the other shareholders exercise their right to purchase said shares of stock within a thirty-day period provided for above, or having exercised the same should fail to purchase the same within the time prescribed, *the right shall be terminated to purchase said shares of stock and the selling shareholder shall be free to sell said stock to a third party, not an existing shareholder*, who shall, however, in turn, be bound by the terms and conditions of these Minutes as fully as if purchaser had been an original subscriber of the capital stock of this corporation.

(Emphasis added.)

As the townhouse project began, 14th Street, Inc. developed the Burnses' land and purchased certain parcels. The townhouse project was to be developed in nine phases, but financial problems arose and construction ceased during phase five. The Burnses became unhappy with the apparent lack of progress and wanted out of the deal as the option on the Burnses' property held by 14th Street, Inc. was due to expire. On April 28, 1994, Irwin and Lacerte purchased the remaining parcels subject to the option agreement from the Burnses. In addition to the land, the Burnses also sold their 2,300 shares of 14th Street, Inc. stock to Irwin and Lacerte and failed to give Barfield prior written notice

of their intentions to sell their stock in order to afford Barfield an opportunity to purchase a pro rata share.

After purchasing the land and stock from the Burnses, Irwin and Lacerte formed a new corporation named 14th Street 400, Inc. The assets of 14th Street, Inc. were transferred into 14th Street 400, Inc. by Irwin and Lacerte. The property purchased from the Burnses by Irwin and Lacerte is also owned by 14th Street 400, Inc. Barfield subsequently brought suit because the Burnses sold their stock to Irwin and Lacerte in violation of the shareholders' agreement.

Barfield claimed he was damaged by the Burnses' sale of stock because he was deprived of the opportunity to buy his proportionate share of the stock that was sold to Irwin and Lacerte, and the stock he owns in 14th Street, Inc. was devalued by the transfer of the assets to 14th Street 400, Inc.

At trial, Barfield argued he was entitled to recover the difference between the value of the 767 shares (his relative proportion of 2,300) of the Burnses' stock minus the contract price for which Irwin and Lacerte purchased it. Barfield also argued he was entitled to recover his interest in 14th Street, Inc. because his stock had been devalued. The jury returned a verdict for Barfield in the amount of $211,930.

After the trial, Barfield filed a Motion to Assess Pre–Judgment Interest from April 28, 1994, through the date of the verdict. A final judgment was entered for Barfield in the amount of $211,930 plus prejudgment interest of $71,626.53. The Burnses' post-trial motions were denied, and this appeal followed.

At trial, Barfield contended that the shareholders' agreement prohibited the sale of the Burnses' stock to Lacerte and Irwin without first giving him notice of the proposed sale and an opportunity to purchase his pro rata share, or in the alternative, that the shareholders' agreement was ambiguous on this point and extrinsic evidence could be presented to show the intent of the parties to the shareholders' agreement. The trial court found that the shareholders' agreement was ambiguous and, over the objection of the Burnses, permitted extrinsic evidence to show the intent of the parties.

At the close of the evidence, after having been permitted to reserve at the close of the plaintiff's case, the Burnses moved for a directed verdict as to liability based upon the specific, clear and unambiguous language of the shareholders' agreement that required notice to shareholders of the sale and an opportunity to purchase a pro rata share of the stock for sale only when the sale was to third parties. The motion was denied. The trial court's failure to direct a verdict was erroneous.

The shareholders' agreement at issue provides that the selling shareholder shall offer to sell his or her interest in shares of stock to all other shareholders on the same terms as are contained in a bona fide written offer made by a third party purchaser. Once notice has been given, should none of the other shareholders exercise their right to purchase said shares of stock, the selling shareholder shall be free to sell such stock to a third party. The triggering event is the offer to sell to a third party. Lacerte and Irwin were parties to the shareholders' agreement, not third parties.

Although contracts are to be construed in order to give effect to the intent of the parties, it is a well settled principle of contract law that where the terms of a contract are unambiguous, the parties' intent must be determined from within the four corners of the document. *Misala, Inc. v. Eagles*, 662 So.2d 1389 (Fla. 4th DCA 1995). In the absence of ambiguity, the language itself is the best evidence of the parties' intent and its plain meaning controls. Contracts are to be construed in accordance with the plain meaning of the words contained therein. *See Fecteau v. Southeast Bank, N.A.*, 585 So.2d 1005 (Fla. 4th DCA 1991); *In Re Estate of Barry*, 689 So.2d 1186 (Fla. 4th DCA 1997).

As this court stated in *Sugar Cane Growers Coop. of Florida, Inc. v. Pinnock*, 24 Fla. L. Weekly D1214, D1216, ––– So.2d ––––, ––––, 1999 WL 314493 (Fla. 4th DCA May 19, 1999):

> Construction of a contract is a matter of law, so an appellate court is free to reassess the contract and arrive at a conclusion different from the trial court. Therefore, we may consider de novo whether the contract terms are unambiguous. Where the language of a contract is clear and unambiguous, there is no need to resort to rules of contract construction or judicial interpretation. (Citations omitted).

In order to determine the plain meaning of “third party,” it is prudent to refer to those references relied upon to supply the accepted meanings of words. Such an inquiry reveals that “third party” is commonly defined as a person other than the principals involved in a case or matter. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2378 (1993). Stated otherwise, “third party” is a term used to include all persons who are not parties to the contract, agreement or instrument of writing in question. BLACK'S LAW DICTIONARY 1122 (6th ed.1990).

Such a reassessment leads to the conclusion that if one is to give effect to the plain meaning of the shareholders' agreement, Lacerte and Irwin were not third parties and thus, the terms of the agreement preclude liability under the facts alleged by Barfield. Accordingly, the trial court's denial of the Burnses'

motion for directed verdict is reversed with directions to enter a judgment in favor of the Burnses.

Problem 14-2

Smith Engines contracted with Jones Nuts-n-Bolts for "1,500 lbs. top-quality, corrosion-resistant screws." Jones Nuts-n-Bolts shipped 1,500 lbs. of corrosion-resistant screws make of a new metal called "Trinitium®." Trinitium is a new and improved version of titanium with one additional chemical element that adds strength and lightness, which also lowers production costs. To Jones Nuts-n-Bolts, this is a "win-win" situation. Based on the metals that Smith Engines uses in its products, it is possible that the new chemical compound in Trinitium may cause some oxidation which, over time, could lead to some corrosion. Smith Engines rejects the shipment, and Jones Nuts-n-Bolts sues for wrongful rejection. Who should win, and why? Would your answer be different if the contract contained an attachment showing the blueprint of Smith's engines, the size and location of the screws being purchased, and at the bottom, the phrase "Screws – 18 per engine, $2^{3/4}$", titanium…"? Would this extra specificity perhaps change the result?

C. Settlement Agreements in Divorce

KNOLL v. KNOLL

District Court of Appeal of Florida, Third District, 2006

689 So. 2d 1186

COPE, C.J.

This is an appeal from an order denying exceptions in proceedings subsequent to a dissolution of marriage. We affirm in part and reverse in part.

The first issue in this appeal is whether the appellant former wife or the appellee former husband was responsible for payment of the 2002 real estate taxes on the marital residence. During the divorce proceedings, the parties entered into a Marital Settlement Agreement. As to the marital home, the agreement provided:

> 9.1 MARITAL HOME: The Husband and his father jointly own the marital residence located at 3265 Allamanda Street, Miami, Florida 33133. The Husband and his father shall execute a Quit Claim Deed transferring their entire interest in this home to the Wife. However, said transfer is conditioned upon the Wife's agreement not to sell, transfer or otherwise dispose of the property for a period of seven and one-half (7 ½) years. The Wife

> may rent the property during this period so long as she obtains replacement housing for herself and the minor child in the South Florida area (Dade, Broward or Palm Beach County). In order to secure the provisions of this paragraph, the Quit Claim Deed will be recorded along with this Agreement and a Lis Pendens in order to put any buyer on notice of the prohibition against sale for the seven and one-half (7 ½) years from the date of this Agreement. The home is not encumbered by a mortgage. The Wife shall be responsible for taxes, insurance, repairs and any other expense necessary to maintaining ownership of the property.

(Emphasis added).

At the time the parties signed the Agreement in May 2003, the 2002 real estate taxes were unpaid and overdue. The Agreement is silent on the responsibility for the overdue real estate taxes, which amounted to approximately $8,000.

Under another provision of the parties' agreement, the former husband was required to pay the former wife $100,000 as equitable distribution. These amounts were payable in quarterly installments of $25,000. The former husband paid the first installment in full on August 15, 2003. By the time the second installment was due on November 15, 2003, the former husband became aware that the 2002 taxes on the real estate remained unpaid, and another $7,000 in real estate taxes had become due for 2003. The former husband unilaterally withheld $15,000 from the quarterly payment so that he could pay the 2002 and 2003 real estate taxes. This left the former wife with $10,000 for that quarter's payment instead of the full $25,000.

The former wife filed an emergency motion for contempt which was referred to the general master. The general master took testimony in which the former husband testified that he told the wife about the overdue 2002 taxes prior to entry into the Marital Settlement Agreement. The former wife denied being told. The tax obligation was not disclosed on the former husband's financial affidavit.
The general master ruled that the plain language of the agreement made the former wife responsible for all tax obligations on the real estate, whether overdue or not. The master ruled that the former wife was obligated to pay the overdue 2002 real estate taxes as well as the 2003 real estate taxes.

The former wife filed exceptions to the ruling regarding the overdue 2002 taxes, maintaining that under the Marital Settlement Agreement, those were the responsibility of the former husband. The circuit court denied the former wife's exceptions and the former wife has appealed. [Footnote omitted]

It has been said that:

> The trial court's interpretation of marital settlement agreements is subject to de novo review. Settlement agreements are to be interpreted in accordance with laws governing contracts. Thus, absent evidence of the parties' intent to the contrary, the unambiguous language of the agreement should be interpreted according to its plain meaning. The court should also consider the object sought by the provision of the agreement.

Johnson v. Johnson, 848 So.2d 1272, 1273 (Fla. 2d DCA 2003) (citations omitted).
Under the facts of this case, title to the marital home was held by the former husband and his father jointly, and the former wife did not have an ownership interest in the real estate. The parties' agreement called for a conveyance of the real estate to the former wife, where she had not previously been a record title owner, and made her "responsible for taxes, insurance, repairs and any other expense necessary to maintaining ownership of the property."

As we view the matter, the parties' agreement made the former wife responsible for obligations coming due during her period of ownership. The 2002 taxes, however, came due (and became overdue) during the former husband's period of ownership and therefore were the obligation of the former husband. We therefore reverse the order now before us regarding the overdue 2002 taxes and remand for entry of judgment for the former wife on that issue.

As to the former wife's second issue on appeal, we affirm the order now before us on authority of *Braswell v. Braswell*, 881 So.2d 1193, 1198 (Fla. 3d DCA 2004).

Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

3. Other Special Rules of Construction

Resort to "other" rules of construction, referred to in the Chart above as the *rules of construction* test, has already been addressed in the two concurrences to the *Penzer* case found in Section A of this Chapter. These are long-standing and time-tested maxims of contract law that may be relied upon for guidance when other avenues prove unavailing. Some of these may already sound familiar. One of the most popular, which is at work in the concurrences to the *Penzer* case, is *construction against the drafter*. If there is an ambiguity, the fault of the ambiguity is on the drafter. Where no other rule better addresses the question, a court may interpret the ambiguity in a way favoring the non-

drafter. Another rule is that the *expression of one thing excludes interpretation in a different or opposing way*. Problem 14-3 attempts to clarify this by example.

There are at least several "other" rules of construction that are used in appropriate situations. The case that follows uses the maxim that, in case of an ambiguity, the questionable term is to be given an interpretation that avoids negating or making meaningless other provisions in the agreement.

McARTHUR v. A.A. GREEN & CO. OF FLORIDA, INC.

District Court of Appeal of Florida, Third District, 1994

637 So. 2d 311

PER CURIAM.

This is a consolidated appeal by the plaintiffs H.R. McArthur and Salvatore E. Reina from adverse final summary judgments entered below in parallel actions for breach of contract. The trial court concluded that this was a terminable-at-will employment contract and that, consequently, the plaintiffs were not entitled, as claimed, to any damages for future salary compensation upon their termination without cause. We reverse and remand for further proceedings.

We cannot agree with the trial court that paragraph 7(c) of the employment contract sued upon authorizes a termination of the plaintiffs' employment without cause. To the contrary, paragraph 6 of the contract authorizes the defendant employer A.A. Green and Company of Florida, Inc. to terminate the employment agreement only for cause, namely, the plaintiffs' (a) habitual neglect of their employment duties, (b) dishonesty or illegal conduct, (c) material breach of any of their obligations pursuant to the agreement, (d) death, or (e) violation of the noncompete provisions of the agreement. Moreover, paragraph 20(b) of the agreement authorizes arbitration in the event the plaintiffs' employment is terminated by the defendant employer for the stated reasons of habitual neglect, dishonesty or illegal conduct; thus, review of the defendant employer's termination of the employment agreement for these reasons is expressly provided for at the request of the plaintiffs.

Paragraph 7(c) of the agreement, in turn, provides that

> "[i]f the [e]mployer terminates this [a]greement for any reason other than the reasons listed in paragraph 6 above, or the [e]mployee terminates this [a]greement, or this [a]greement is terminated pursuant to subparagraphs 6(a)-6(c) [termination based on plaintiff's habitual neglect of employment duties, dishonesty or illegal conduct, or a material breach of any of

> plaintiffs' obligations under this agreement], then the [e]mployer shall pay to the [e]mployee [salary through termination and certain noncompete compensation], but no further compensation of any kind shall be payable hereunder."

(emphasis added).

We construe the term "reason" in the emphasized portion of this paragraph to mean a reason based on cause, albeit a cause not listed in paragraph 6-not, as the trial court concluded, to mean a reason having nothing to do with cause at all.

We reach this result because any other construction renders paragraphs 6 and 20(b) of the agreement entirely meaningless as a practical matter. If, as the trial court concluded, the defendant employer could terminate the agreement and dismiss the plaintiffs based on no cause whatever and still not be liable to the plaintiffs for any further salary compensation other than through the date of termination, such a no-cause termination would be resorted to in all cases. There would be no financial incentive whatever for the defendant employer to terminate the plaintiffs' employment for any of the stated causes provided in paragraph 6 because such a termination could later be adjudged wrongful in arbitration proceedings, as provided in paragraph 20(b), or in a breach of contract action in court, resulting in a possible damage award to the plaintiffs for future salary compensation under the agreement. A termination without cause, on the other hand, would absolutely guarantee that no such future damages could ever be obtained and obviously would be resorted to by the defendant employer in all cases, thereby rendering paragraphs 6 and 20(b) of the agreement entirely superfluous. Stated differently, paragraphs 6 and 20(b) of the contract militate against construing the instant agreement as an employment contract terminable at will, else these paragraphs become virtual dead letters. Clearly, we are constrained by law to construe a contract as a whole so as to give effect, as here, to all provisions of the agreement if it can be reasonably done. *Paddock v. Bay Concrete Indus., Inc.*, 154 So.2d 313, 315-16 (Fla. 2d DCA 1963); *see American Medical Int'l, Inc. v. Scheller*, 462 So.2d 1, 7-8 (Fla. 4th DCA 1984), *rev. denied*, 471 So.2d 44 (Fla.), *cert. denied*, 474 U.S. 947, 106 S.Ct. 345, 88 L.Ed.2d 292 (1985); *see also Insurance Co. of N. Am. v. Stevens*, 425 F.2d 704, 705 (5th Cir.1970).

The final summary judgment under review is therefore reversed and the cause is remanded to the trial court for further proceedings.

Reversed and remanded.

Problem 14-3

In a four-page contract between the parties, Drafter Buyer used the term "condition" fifteen times. Unfortunately, for the sixteenth time, Drafter Buyer used the term "obligation." If the term "obligation" is interpreted as a condition, then a failure by the Non-Drafter Seller terminates Drafter Buyer's duties under the contract and Drafter Buyer may still be able to sue for damages caused by the breach. (Conditions are addressed in Chapters 17-18.) If the term is interpreted as a promise, then the Non-Drafter Seller may continue to perform despite the breach – and the Drafter Buyer may get damages for the breach, but will not be able to avoid appropriate performance under the terms of the contract. Who wins, and why? It may be helpful to know that the rule, *expresio unius est exclusion alterius*, is usually applied in statutory construction rather than contracts construction. *But see Quadrant Structured Products Co., Ltd. v. Vertin*, 23 N.Y.3d 549; 16 N.E.3d 1165; 992 N.Y.S.2d 687 (Ct. App. NY 2014) (omission or non-use of a known term by a sophisticated drafter precludes application of such term – its non-use is deemed to be intentional).

Notes

29. At the unfortunate risk of making things more confusing, it would seem that Florida courts, at least in some cases, would require use of the *plain meaning* and/or the *four corners* tests for ***patent*** ambiguities. Consequently, only where an ambiguity is ***latent*** would the courts use the more *extrinsic* tests, i.e. *rules of construction,* or the *holistic* Corbin/Rest. (Second), U.C.C. Article 2 test. *See Partylife Gifts, Inc. v. MacMillan*, 895 F.Supp.2d 1213 (M.D. Florida, Tampa Division 2012), which provides:

> Florida courts recognize two types of ambiguities-patent and latent. *Nationwide Mut. Fire Ins. Co. v. Pollinger*, 42 So.3d 890, 892 (Fla. 4th DCA 2010). The Eleventh Circuit, quoting from Florida case law, described the distinction as follows:
>
> > "[A] patent ambiguity is that which appears on the face of the instrument and arises from the use of defective, obscure, or insensible language. Extrinsic evidence is inadmissible if the ambiguity is patent, because such evidence would, in effect, allow the court to rewrite the contract for the parties by supplying information the parties themselves did not choose to include. A latent ambiguity, on the other hand, is said to exist where a contract fails to specify the rights or duties of the parties in certain situations and extrinsic evidence is necessary for interpretation

> or a choice between two possible meanings. In such instance, this evidence is required because the instrument itself does not provide sufficient insight into the intent of the parties. *Crown Mgmt. Corp. v. Goodman*, 452 So.2d 49, 52 (Fla. 2d DCA 1984) (citations omitted)."
>
> *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1310 (11th Cir.1998); *see also Optowave Co. Ltd. v. Nikitin*, No. 6:05–cv–1083–Orl–22DAB, 2006 WL [ ] (M.D.Fla. Nov. 7, 2006) (*citing United States o/b/o Small Business Administration v. South Atlantic Production Credit Assoc.*, 606 So.2d 691, 695 (Fla. 1st DCA 1992)).

See also, e.g., Nationstar Mortgage Company v. Levine, 216 So.3d 711. 714-717 (4th DCA 2017); *Real Estate Value Co. Inc. v. Carnival Corp.*, 92 So.3d 255, 260 (3d DCA 2012).

30. It should be noted that resort to these "other" rules of construction, if not carefully tied to the expressed intent of the parties, provides courts with virtually unfettered discretion to determine the result – since these questions are decided by courts and not by juries. For example, where there is a bias against major corporations, banks and other "big business," which institutions are often the parties who usually draft agreements, it is a simple matter to apply the rule of construction against the drafter. In many cases, it would be just as easy to glean the drafter's intent (favorably) and to apply the rule of construction that terms are to be construed as a whole and to thereby afford a harmonious meaning to all provisions. (This could lead to the opposite result). It would also be no major task to glean an ambiguity in a term that might be relatively clear, in order to apply one of the "other" rules of construction. Those unable to understand the differences between the rules of interpretation inadequately assert their hierarchy. Careful attention to the hierarchy set out in this Chapter, and the ability to get it onto the record before a court of first instance, may ensure success in cases that should not be lost. Even the question of "patent" vs. "latent" could be used to slant a decision one way or the other as it decides whether use of extrinsic evidence is permitted or excluded, since review is *de novo* or appellate court applies what it thinks best (or possibly a deferential standard). If it reverses a trial court ruling, is it clear that it is the trial court's mistake or bias, or is it on the part of the appellate court? More strict attention to the proposed hierarchy should help to shed more light in this

regard. As a placeholder only for future consideration, are the early hierarchical rules "red" and the latter ones "blue"?

4. Extrinsic Evidence – The Holistic Approach

The most flexible test is the one that allows use of extrinsic evidence to explain the meaning of ambiguous terms in a contract. This holistic approach, which would allow review of prior emails, brochures, discussions, etc., to explain the written terms of an agreement is the one favored by the Restatement (Second) Contracts and by the U.C.C. Article 2 in the case of sales of goods. Extrinsic sources, along with writings and discussions made prior to or contemporaneous with (there is a reason for this language – *see* Chapter 15) the execution of an agreement, include how the parties performed in the past, as well as after the agreement was formed. Its primary academic champion is Yale Law School's Professor Corbin, who espoused a theory of *legal realism* attempting not to apply too strict an interpretation of the words used in an agreement, but to discern what was really going on in the minds of the contracting parties. Borrowing an analogy to constitutional interpretation, where Williston would favor a more rigid interpretation favoring the "intent of the original drafters and framers," Corbin would treat contracts as "living and breathing documents" and allow for a more expansive inquiry. This is not a book about politics, but practitioners of contracts and transactional law are well advised to discern the political and business leanings of the judges in front of whom they practice. This allows the crafting of argument to be more persuasive for knowing the types of arguments that a particular court would tend to favor. And support or call out to preserve a *de novo* appeal, depending on the client's position?

There is a dearth of Florida cases exploring the use of extrinsic evidence to explain a contractual ambiguity. Nevertheless, this is the law of other states, and despite a lack of significant case law, it is also somewhat off-handedly included in the common law of Florida. The following case concerns a deed, which under Florida law is to be interpreted using the same rules as are used for the interpretation of ambiguous terms in contracts. Along with other rules of construction such as interpretation in way so as not to defeat the purpose or the workings of other provisions in a contract, the introduction of extrinsic evidence is permitted to determine the intent of the parties. (This would be true were other, prior tests fail to supply the interpretation). Although it is difficult to spot for being couched in brief and obscure language, the extrinsic evidence involves the general nature of use of public parks by the citizenry in a passive way. This does not include use of cell phones or reliance on cell towers to make cell telephone calls in public parks. Where Florida cases are lacking, it is sometimes possible to verify the law by resort to federal cases. *See, e.g., In re Ranch Motor House Inn International, Inc.*, 335 B.R. 894, 898 (U.S. Dist. Ct. M.D. Florida, Tampa Div. 2006). Note: the final six paragraphs

of the following opinion, reproduced in full, are unnecessary to the direct question of extrinsic evidence in the case of ambiguity. They do, however, remind of some of the relevant remedies issues addressed *supra* in Chapters 9 – 12 and especially in Chapter 12.

AT&T WIRELESS SERVICES OF FLORIDA, INC. v. WCI COMMUNITIES, INC.

District Court of Appeal of Florida, Fourth District, 2005

932 So. 2d 251

SHAHOOD, J.

We affirm the final judgment ordering the demolition and removal of a telecommunications tower from Sherwood Forest Park and permanently enjoining appellants from maintaining a tower on that property.

FACTS

On April 19, 2002, appellee, WCI Communities, Inc. (WCI), sought injunctive relief against appellants, AT & T Wireless Services of Florida, Inc. (ATT) and the City of Coral Springs (the City), to prohibit the violation of a deed restriction relative to certain lands deeded to the City.

In 1975, Florida National Properties, Inc., conveyed, by Warranty Deed, certain property to the City, including the subject "Sherwood Forest Park." WCI, a major landowner and developer in the City, was the successor-in-interest to the grantor of the Warranty Deed. The Warranty Deed contained the following restriction:

> In consideration of this conveyance, by acceptance hereof, the Grantee [City] agrees and understands and assures to Grantor that the above described property would be used and maintained **solely for passive park purposes unless the express written consent of Grantor, its successors or assignees, is first obtained**.
>
> The property herein conveyed is dedicated to the public for use as passive parks.
>
> SUBJECT to easements, restrictions, covenants, limitations and conditions of record.
>
> (Emphasis added).

In October 1996, the City passed Ordinance 96–137 with the intent to: (1) promote the health, safety and general welfare of the citizens by regulating the siting of telecommunications towers; (2) provide for the appropriate location and development of telecommunications towers and antennas within the city; and (3) minimize adverse visual effects of telecommunication towers and antennas through careful design, siting, landscape screening and innovative camouflaging techniques. The Ordinance allowed freestanding telecommunications towers to be placed in parks and recreation areas greater than five acres. Sherwood Forest Park was listed on the City's list of parks as potential sites for cellular towers.

On July 9, 2001, the City, over WCI's protest, entered into a lease agreement with ATT to install a telecommunications tower in Sherwood Forest Park. The City leased to ATT 1600 square feet of park land for the construction of a “Stealth Tree type tower, [Footnotes omitted]” equipment building, black chain-link fencing and associated equipment. WCI protested on the grounds that the City's approval for the construction of the telecommunications tower was in violation of the deed restriction on the park's use. In January 2002, the City processed and approved an application for the issuance of a building permit to ATT to construct an eighty-five (85) foot telecommunications tower, a maintenance building and access ways, supporting structures, and hard-surface areas.

In its complaint, WCI alleged that the use contemplated by ATT and the structure submitted for a building permit was an active commercial use and not a passive use, and thus, the use and construction thereof are violative of the deed restriction. Moreover, neither the City nor ATT requested or received WCI's express written consent for the construction of the tower.

On July 22, 2004, the trial court granted injunctive relief to WCI. In its order, the court set forth the deed restriction governing the park, that the park was conveyed to the City by Warranty Deed and that WCI was the successor-in-interest to the grantor. The court found that both ATT and the City investigated the status of the title of the park prior to entering the lease agreement for the construction of the telecommunications tower, and that they were aware of the applicable deed restriction. “Neither the City, nor AT & T Wireless, made a request to WCI Communities, Inc. for consent to waive the restriction, or to place a communication tower in the park.” The court noted that the public was physically excluded from the leased property and that the City was receiving a financial benefit from its commercial venture. The court held that there was no ambiguity in the deed restriction and that the park was to be used for “passive park purposes only.” The court held that the use of the park space was a direct violation of the deed restriction, and therefore, impermissible.

In granting injunctive relief, the court found that “it is impractical, and unwise, to order the immediate destruction of the cellular communication tower. That would, no doubt, affect the public negatively. Thus, the injunctive relief provided is modified from that sought by plaintiff.” The court ordered that ATT search for, and attempt to acquire or lease an alternate location for a communications tower which would provide suitable coverage to residents and the police, within a 24–month period. The parties were directed to return to the court at least quarterly to report on the status of the matter.

ANALYSIS

We affirm the trial court's findings that the City violated the deed restriction by using the park property for a telecommunications tower and that injunctive relief was warranted.

Deed restrictions on lands are deemed contractual in nature and subject to the same rules of interpretation as are contracts. *See generally Hill v. Palm Beach Polo, Inc.*, 717 So.2d 1080, 1081 (Fla. 4th DCA 1998). The construction of a contract is a question of law for the courts. *See Turner Constr. Co. v. Cent. Fla. Equip. Rental*, 904 So.2d 474, 475 (Fla. 3d DCA 2005); *Land O'Sun Realty Ltd. v. REWJB Gas Inv.*, 685 So.2d 870, 871 n. 3 (Fla. 3d DCA 1997).

When a contract is clear and unambiguous, the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of the language controls. *See Fecteau v. Southeast Bank, N.A.*, 585 So.2d 1005, 1007 (Fla. 4th DCA 1991); *see also Jones & Scully, Inc. v. O'Connell*, 604 So.2d 867, 868–69 (Fla. 3d DCA 1992), *review denied*, 618 So.2d 210 (Fla.1993). When a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties. *See Fecteau*, 585 So.2d at 1007. Although restrictive covenants should be narrowly construed, they should not be construed in a manner that would defeat the plain and obvious purpose and intent of the restriction. *See McMillan v. The Oaks of Spring Hill Homeowner's Ass'n*, 754 So.2d 160, 162 (Fla. 5th DCA 2000). Restrictive covenants will be enforced where their intent is clear and their restrictions are reasonable. *See Imperial Golf Club, Inc. v. Monaco*, 752 So.2d 653, 654 (Fla. 2d DCA 2000) (construction of a restroom facility on a golf course violated restrictive covenant requiring complete visibility of golf course).

In this case, the trial court properly concluded that there was no ambiguity in the deed restriction requiring that the property be “used and maintained solely for passive park purposes” and that the “property herein conveyed is dedicated to the public for use as passive parks.” The court held that “[t]he park was to be used for passive park purposes only. Fractional use was not

specified. Presently, a fraction of the park is not being used for passive purposes."

Here, the actual issue turns not on whether the telecommunications tower's use was passive, as argued by appellants, but whether the use was consistent with the deed restriction that limits use "solely" to "passive park purposes." "In construing restrictive covenants the question is primarily one of intention and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant." *White v. Metro. Dade County*, 563 So.2d 117, 123 (Fla. 3d DCA 1990) (*quoting Thompson v. Squibb*, 183 So.2d 30, 32 (Fla. 2d DCA 1966)). Courts have unfailingly guarded against encroachments on public park land where such park land is under the protection of a deed restriction or restrictive covenant. *See id*.

In this case, quite simply, the use of the park for the telecommunications tower is not related to or in furtherance of "solely for passive park purposes." A telecommunications tower does not support a park use. While appellants argue that the tower supports a park use, like utilities or restrooms, because someone at the park could make a cell call from the park, the tower has no park use. *See, e.g., White*, 563 So.2d at 124 (the operation of the Lipton tournament violated the deed restriction "public park purposes only" because it deprived the public of the use and enjoyment of the park, including the tennis facilities, during the tournament for an extended period of time).

The City devoted a portion of deed-restricted park lands to a private commercial enterprise and as a result restricted access of park lands from the public's use. While courts have consistently ruled that commercial benefit does not defeat a park purpose, the telecommunications tower has no park purpose. *See id*. ATT's use of the park property is neither passive, nor is it used to support the park. The lands are being used to fill in ATT's telecommunications grid for monetary gain.

[*The remainder of the opinion considers damages and particularly their possible insignificance*]

Next, we reject appellants' claim that injunctive relief is not available for a "de minimis" violation. They claim that the impact of the "tree tower" on the passive recreational use of the park was minimal and that WCI was unaffected by the use. Appellants rely upon *Thompson* which held that property restricted to use for residential purposes, so long as it is in good faith used for such, may also be used to a minor extent for the transaction of some classes of business or other pursuits so long as such is merely casual or unobtrusive and results in no appreciable damage to neighboring property. 183 So.2d at 32. However, such use must be reasonably incidental to residential uses and such

an inconsequential breach of the covenant as to be in substantial harmony with the purpose of the parties in making the covenants. *See id*. at 32.

A minor violation of the deed restriction is still a violation of the deed restriction. “The scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor.” *City of Orlando v. MSD–Mattie, L.L.C.*, 895 So.2d 1127, 1130 (Fla. 5th DCA 2005). “The scope of an express easement for a stated purpose cannot be expanded to include any use merely because such use does not impose an added burden on the servient estate.” Id. In this case, while the impact of the tower to the neighborhood is minimal, the telecommunications tower is not reasonably incidental to “passive park purposes.”

Accordingly, we hold that the trial court did not err in granting permanent injunctive relief. *See St. Lucie County v. St. Lucie Village*, 603 So.2d 1289, 1292 (Fla. 4th DCA), *review denied*, 613 So.2d 12 (Fla.1992) (a party seeking injunctive relief in Florida must demonstrate: (1) irreparable harm; (2) a clear legal right; (3) an inadequate remedy; and (4) consideration of the public interest); *White*, 563 So.2d at 126 (an injunction is a proper remedy for violation of a restrictive covenant).

WCI, as the successor-in-interest to the grantor of the Warranty Deed, not only had a continuing interest in the property and a clear legal right to enforce the deed restriction, but appellants violated that deed restriction without obtaining WCI's express written consent.

Further, we reject appellants' claim that the trial court found that the public interest would not be served by granting the relief sought. Although the trial court held that the immediate destruction of the cellular telecommunications tower “would, no doubt, affect the public negatively,” that does not support appellants' claim. The order granting the injunction clearly stated that the public was physically excluded from the leased property. This exclusion cut off access to park property to the very members of the public for whose benefit the park was given. This exclusion was inconsistent with the deed restriction. Further, the public interest was served by the maintenance of WCI's common plan for development. While appellants characterize the telecommunications tower as a de minimis violation, it was nevertheless a violation of which they were aware and which they ignored. The public interest is best served by the maintenance of the parks, as dedicated and restricted, particularly where there is a common plan served by the parks.

Appellants further argued that the public interest would be harmed if the injunction were entered where the telecommunications tower served the public interest by providing safety to its citizens through the reception of 911 calls made from the area. Appellant cannot negate the property and legal rights of others based on a decision regarding public safety. *See generally*

Daniel v. May, 143 So.2d 536, 537 (Fla. 2d DCA 1962) (a mandatory injunction to remove structures in violation of restrictive covenants may be granted without taking into consideration the relative amount of inconvenience or injury to be suffered by the parties). Here, the City circumscribed the location of telecommunications towers to City park lands and presented ATT with Sherwood Forest Park as the only candidate site. Clearly, public safety was not the City's most paramount concern as evidenced by its removal of phone service previously available to park users due to the low revenue it generated.

Lastly, we reject appellants' claim that the injunction improperly requires the trial court's continuing on-going supervision. The trial court did not contemplate assumption of day-to-day management responsibility for the use of the telecommunications tower. Rather, in an effort to balance the competing interests and ensure fairness to all involved, the court properly ordered the removal to take place over time, allowing ATT and the City to relocate the necessary cellular telecommunications tower. The two-year transition period was intended to allow for the removal of the tower in a manner that minimizes potential harm to the parties and the public.

As to all other issues, we affirm without comment.

Affirmed.

4. Contract Interpretation Questions for the Jury (Fact-Finder)

Even using the holistic test and balancing facts to clarify an ambiguity, it would appear to be the court's role, and not that of a jury, to apply the extrinsic facts for a determination of meaning. *See, e.g.*, *Laufer v. Norma Fashions, Inc.*, 418 So. 2d 437, 439 (Fla, App. 1982); *see also In re Ladd*, 920 So. 2d 1148, 1150 (Fla. 3d. DCA 2006). This leads to a bit of a conundrum, as in most cases, questions of fact are for juries (as fact finders) and not the courts. Not to be forgotten is the fact that in some cases of contractual interpretation, the jury plays a role. The following Florida standard jury instruction, and the cases located in supporting notes, help to define the jury's role in such cases. Unfortunately it does not make particularly clear when a court decides as matter of law and when it is a question of fact to be presented by the following jury instructions.

FLORIDA STANDARD JURY INSTRUCTIONS – CONTRACTS AND BUSINESS CASES[34]

* * * *

416.14 INTERPRETATION — DISPUTED TERM(S)

[34]

(Claimant) and (defendant) dispute the meaning of the following term(s) contained in their contract: (insert text of term(s)).

(Claimant) claims that the term(s) means: (insert claimant's interpretation of the term(s)). (Defendant) claims that the term(s) means: (insert defendant's interpretation of the term(s)). (Claimant) must prove that [his] [her] [its] interpretation of the term(s) is correct.

In deciding what the term(s) of a contract mean, you must decide what the parties agreed to at the time the contract was created.

In order to determine what the parties agreed to, you should consider the plain and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract. The agreement of the parties is determined only by what the parties said, wrote, or did. You may not consider the parties' thoughts or unspoken intentions.

Note: The following instruction should be given if the court is going to give additional instructions related to disputed term(s).

[1 will now instruct you on other methods that you should use in resolving the dispute over term(s) in the contract:]

NOTE ON USE FOR 416.14

Read any of Instructions 416.15 through 416.20 (as appropriate) on tools for interpretation after reading the last bracketed sentence. The instructions on interpretation are not exhaustive and the court may give any additional instruction on interpretation applicable to the facts and circumstances of the particular case provided it is supported by Florida law.

SOURCES AND AUTHORITIES FOR 416.14

1. The interpretation of a contract is normally a matter of law that is determined by the court. *Smith v. State Farm Mut. Auto. Ins. Co.*, 231 So.2d 193, 194 (Fla. 1970); *Strama v. Union Fidelity Life Ins. Co.*, 793 So.2d 1129, 1132 (Fla. 1st DCA 2001). Under certain circumstances, however, such as when the terms of a contract are ambiguous or susceptible to different interpretations, an issue of fact is presented which should be submitted to the jury. *First Nat'l Bank of Lake Park v. Gay*, 694 So.2d 784, 788 (Fla. 4th

DCA 1997); *State Farm Fire & Cas. Co. v. De Londono*, 511 So.2d 604, 605 (Fla. 3d DCA 1987). "The initial determination of whether the contract term is ambiguous is a question of law for the court, and, if the facts of the case are not in dispute, the court will also be able to resolve the ambiguity as a matter of law." *Strama*, 793 So.2d at 1132; *Ellenwood v. Southern United Life Ins. Co.*, 373 So.2d 392, 394 (Fla. 1st DCA 1979).

2. In Florida, an objective test is used to determine the agreement of the parties. *Fivecoat v. Publix Super Markets, Inc.*, 928 So.2d 402, 403 (Fla. 1st DCA 2006). The agreement of the parties "is ascertained from the language used in the instrument and the objects to be accomplished …." *Rylander v. Sears Roebuck & Co.*, 302 So.2d 478, 479 (Fla. 3d DCA 1974); *Jones v. Treasure*, 984 So.2d 634, 638 (Fla. 4th DCA 2008). When determining the agreement of the parties, a court need not consider whether or not the parties reached a subjective meeting of the minds as to the terms of a contract. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985). "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing." *Id.* (quoting *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957)). Accordingly, the plain meaning of the language used by the parties controls as the best indication of the parties' agreement. *SPP Real Estate (Grand Bay), Inc. v. Joseph J. Portuondo, P.A.*, 756 So.2d 182, 184 (Fla. 3d DCA 2000). Thus, the terms in a contract should be interpreted in accordance with their plain and ordinary meaning. *Kel Homes, LLC v. Burris*, 933 So.2d 699, 702 (Fla. 2d DCA 2006).

3. The norms of contractual interpretation may vary in certain areas of the law. For example, although the existence of an ambiguous contractual term typically creates an issue of fact as to the intent of the parties which should be resolved by the jury, this principle of law is not applicable to contracts between contractors and subcontractors with regard to risk-shifting provisions. *Dec Elec., Inc. v. Raphael Constr. Corp.*, 558 So.2d 427, 428-29 (Fla. 1990). In such instances, the intention of the parties may be determined from the written contract as a matter of law because the nature of the transaction makes it appropriate for a court to resolve the apparent ambiguity. Id. "The reason is that the relationship between the parties is a common one and usually their intent will not differ from transaction to transaction, although it may be differently expressed." *Id.* at 429. The norms of contractual interpretation also do not apply to insurance contracts, as

ambiguities are always to be construed against the insurer and in favor of coverage.

Notes

22. Readers have discerned by now that the Notes in this book attempt to de-mystify what can otherwise be an obscure and challenging topic. Even as the book went to press, so to speak, two more important points required explanation in this Chapter. If you gleaned one or both of them, you deserve affirmation for a job well done. If you did not, this is still an excellent learning opportunity…

23. You may have wondered why interpretation steps four and five may be distinguished on the basis of their extrinsic nature. Do not both involve the same 'holistic' approach? (Yes.) The answer centers upon not the test used (no extrinsic data, a bit more extrinsic data limited to the document itself, legal truisms developed by the courts as rules of construction, and the 'holistic' test that allows clearly extrinsic data, and counts on the courts to balance the evidentiary value of each aspect of the proofs). The classification as more extrinsic for the fifth test centers upon the fact that there are not only additional items of proof, but also a larger pool of their assessors. The question at the fifth phase does not involve only the judge and the parties, but it also involves the jury (with the exception of a bench trial, where the judge is also the fact-finder). Knowing this, talented litigators would want to steer a case one way or the other depending on what is in the best interest of the client.

24. In fact, there is a good reason why sometimes contractual interpretation questions are questions of fact rather than of law. …..

25. The second burning question is why a clearly factual issue is a question of law and not of fact, such that courts typically decide interpretation issues. The answer stems from developing of the law. A "law merchant" or *lex mercatoria* developed whereby business decided their own cases, which removal of jurisdiction was noted and was responded to by the courts of Great Britain – albeit with the foresight to call in experts of a particular business as needed to supplement court competence. *See* WHALEY & MCJOHN, PROBLEMS AND MATERIALS ON COMMERCIAL LAW 1-2 (10th ed. Wolters Kluwer Aspen Casebook Series). In fact, courts felt that juries did not possess sufficient

comprehension and context of business to properly decide complex contractual issues. (If anyone sees a parallel to the development of the arbitration system as a replacement for the judicial one, you are on the right track – practically speaking, arbitration is a further development for the same concern – that decision makers without significant business experience do not have enough context or knowledge (or viewpoint?) to properly handle major contractual issues). The Florida courts are no exception, and this is particularly true in cases that involved contractors and subcontractors. *See, e.g., Peacock Constr. Co., Inc. v. Modern Air Conditioners, Inc. et al.*, 353 So.2d 840 (Fla. 1977) ("If an issue of contract interpretation concerns the intention of the parties, that intention may be determined from the written contract as a matter of law, when the nature of the transaction lends itself to judicial interpretation. A number of courts, with whom we agree, have recognized that contracts between small contractors and general contractors on large construction projects are such transactions. [ ] The reason is that the relationship between the parties is a common one and usually their intent will not differ from transaction to transaction, although it may be differently expressed.") (Does the last sentence entail test # 4 presented and recommended in this Chapter?) *See also Team Land Development, Inc. v. Anzac Contractors, Inc.*, 811 So.2d 698 (Fla, 3d DCA 2002 ("The interpretation of contractual provisions between general contractors and subcontractors is a question of law.") (Is there absolutely no room in such situations for a genuine factual issue?) In fact, one contractor/subcontractor case acknowledges a factual controversy which, according to the Court, is ordinarily one of fact for the jury but not in cases of contractors and subcontractors. *See DEC Electric, Inc. v. Raphael Construction Corporation*, 558 So.2d 427 (Fla. 1990).

26. Tracking the laws of many other states, one court ruled that the court decides ambiguity as a matter of law but also held that if the facts are undisputed a court decides such issues as a matter of law, but if there are more than one reasonable interpretation, summary judgment should not be granted. *Strama v. Union Fidelity Life Ins. Co.,* 793 So.2d 1129 (Fla. 1st DCS 2001). It is unclear whether a decision on which reasonable interpretation is for the courts for for the jury. Other cases support a point made in the early paragraphs of this Chapter: i.e., that courts sometimes use a conglomeration of tests and goals rather than a single one, as if more than one test tips the scales. *See, e.g. Waverly 1 And 2, LLC v. Waverly at Las Olas Condominium Association, Inc.*, 242 So.3d 425 (Fla.

4th DCA 2018 (using the second, "four-corners" test in addition to the first, "plain meaning" test). At least the court in *Real Estate Value Company, Inc. v. Carnival Corp.*, 255 So.3d 255 (Fla. 3d DCA 2012) used the "patent/latent" distinction to determine whether in interpretation question was one for the court as a matter of law or for the fact-finder, as was addressed in Note 1 to Section 2.C. of this Chapter.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 14

44. The different tests (*also known as* "rules of construction") and their hierarchy from least to most extrinsic
45. The overlap, and sometimes the blurring of lines, between these tests
46. Formalistic –vs.– liberal rules of contract interpretation

SUGGESTED EXERCISES

(36) Have students research Florida case law on contract interpretation using, alternately, search terms involving "plain meaning" on the one hand, and use of "extrinsic evidence" on the other. Which has won the day more often in the Florida appellate courts? Why? Is it a matter of convenience, or something else?

(37) Have students research the laws of a different state than Florida in search of a jurisdiction that more readily recognizes (and therefore has more case law on) the use of extrinsic evidence to clarify latent contractual ambiguities.

CHAPTER 15: COURSE OF DEALING, COURSE OF PERFORMANCE, & USAGE OF TRADE

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Discerning what the parties may have intended when written contractual arrangements are potentially incomplete (an integration question, Chapter 16)

or uncertain (ambiguous and requires interpretation, Chapter 14) may sometimes be answered by assessment of the parties' conduct. Do not forget that a court *could* find that the parties have not yet reached an agreement (i.e., still in preliminary negotiations). A court *could* also find that an agreement had been reached but that it needed implied-in-fact or implied-in-law terms to complete it. The implied-in-law terms include things such as the duty of parties to act in good faith (and to craft terms that comport with the duty to act in good faith). Implied-in-fact terms derive from how parties have interacted with each other, in the following order: (1) how the parties have acted in the transaction in question; (2) how the parties have acted in prior, similar transactions; or (3) how different parties in similar situations typically act with which the parties would be familiar. The first is, of course, "course of performance." The second is "course of dealing." The final is "usage of trade." Note that the organization as demonstrated by the title of this Chapter follows the order of U.C.C. § 2-202(b), FLA. STAT. § 672.202(1) (2017). The order as set out in this paragraph, however, puts *course of performance* before *course of dealing*. The reason is based on the intrinsic/extrinsic continuum introduced in Chapter 14. Activities done in relation to the transaction at issue are more intrinsic. Activities done in the past, albeit in similar kinds of transactions, are nevertheless one step further extrinsic. With apologies, the authors recommend changing the order set out by the U.C.C. and the state adoption of the same. Restatement (Second) Contracts § 203(b), reproduced below, follows this logic. The reason for this is to work from the most intrinsic to the least intrinsic. The following CMM Approach may help.

CMM Approach: When looking to supplement a non-integrated contract (Chapter 16) or to interpret an ambiguous term (Chapter 14), the former of which is actually a subset of the latter, it may be helpful to memorize the following:

35. Same parties, same transaction: course of performance (more intrinsic)
36. Same parties, different (prior) transactions: course of dealing (less intrinsic)
37. Different parties, similar transactions: usage of trade (even less intrinsic)

1. Rules of Interpretation Preference

As readers should recall from Chapter 14, a court may resort to rules of contract interpretation. It should be remembered that these rules are

guidelines and not absolute rules that the court must follow. While there is a hierarchy from the perspective of most intrinsic to least intrinsic, courts have generally neglected to ratify this distinction, either for lack of understanding or for an invidious desire to maintain as much discretionary wiggle room as possible so as to select a rule (remember from Chapter 14 that this usually is a question of law for the court, not a question of fact for the jury) that best reflects the result that a court wishes to sanction. Recall the rules of construction against the drafter; expression of one thing excludes interpretation in a different or opposing way, and avoiding negating or making meaningless other provisions in the agreement. These are the third most intrinsic (least extrinsic) mechanisms for interpretation. What follows is resort to more extrinsic factual clues, which apply to interpretation (Chapter 14) as well as integration (Chapter 16) questions.

CMM Approach: Warning – courts may vehemently disagree with the very logical and clear hierarchy that the authors advocate, especially those courts preferring a results-oriented approach rather than one that conforms to clear logic.

A. U.C.C. § 2-202 & FLA. STAT. § 671.205 (2017)

CAULKINS INDIANTOWN CITRUS CO. v. NEVINS FRUIT CO., INC.

District Court of Appeal of Florida, Fourth District, 2002

831 So. 2d 727

HAZOURI, J.

Huff Groves, Vista Packing Co., Dearhardt Groves, Inc. and Nevins Fruit Co., Inc. (Plaintiffs) filed suit against Caulkins Indiantown Citrus Company ("Caulkins") for breach of standard form fruit participation contracts. The case proceeded to a jury trial and at the close of the Plaintiffs' evidence, the trial court entered a directed verdict and final judgment in favor of Caulkins and against Plaintiff, Nevins Fruit. Nevins Fruit timely appeals from this directed verdict and final judgment. (Case No. 4D01–312). The jury trial proceeded on the remaining Plaintiffs' claims. Pursuant to the jury's verdict, final judgment was entered in favor of the remaining Plaintiffs and against Caulkins. Caulkins timely appeals on the basis that the jury's verdict was not supported by competent substantial evidence and Plaintiffs cross-appeal (Case No. 4D01–363). These cases have been consolidated for this appeal.

Material Facts

The Plaintiffs are citrus growers and Caulkins operates a citrus processing plant which processes fruit into frozen concentrate and other byproducts and sells the end product to third party buyers. Plaintiffs entered into separate but identical standard form fruit participation contracts (“the contract”) with Caulkins, agreeing to supply Caulkins with citrus. This case deals with whether Caulkins breached the contract by incorrectly calculating the monies due Plaintiffs.

In September 1988, Via North America, Inc. (VNA), a U.S. holding company of Compagnie de Navigation Mixte (CNM) and Compagnie Francaise de Sucrerie (CFS), acquired all the common stock of Caulkins. [Footnote omitted] The citrus groves and the related grove assets were purchased and are operated by Via Tropical Fruits, Inc. (VTF), a wholly owned subsidiary of VNA. Caulkins continued to solely operate the fruit processing plant. Prior to September 1988, Caulkins was owned equally by three limited partnerships whose groves, which are now owned by VTF, supplied and continue to supply a portion of the fruit processed by Caulkins.

In addition to processing the fruit supplied by VTF, Caulkins processes fruit acquired through individual cash purchases and through the standard participation contracts at issue in this case. The contract was drafted by Caulkins and was used by Caulkins prior to the purchase by the French company.

Pursuant to the contract, Plaintiffs agreed to sell citrus fruit to Caulkins for processing over four growing seasons between 1989 and 1993. Caulkins' payments to Plaintiffs are quantified on a dollars per pound solid base and are referred to in the industry as the “pool return.” The pool return is calculated by pooling the revenue from the sale of all fruit products and deducting its fees and operating and processing expenses. The pool return is paid to Plaintiffs on a pro rata basis, depending on the amount and the type of fruit delivered to Caulkins. The contract further provides that the price to be paid shall be computed by a firm of certified public accountants selected by Caulkins.

Although the contract was not amended, once the French company acquired Caulkins in 1988, Caulkins decided to revise the way in which it calculated the pool return by reclassifying what would be considered revenue and what would be considered an expense.

Huff Groves, Dearhardt and Vista supplied fruit pursuant to the contract during the 1989–90 season, the first season that the pool calculation was revised. Dearhardt and Vista also supplied fruit pursuant to the contract during the 1990–91 season and Vista again during the 1991–92 season. They were never informed that Caulkins had revised its pool calculation. On the contrary, Palmer Tuthill, the plant manager, testified that he informed

growers that business would continue as usual. Tuthill and Plaintiffs testified that as a result of the revised calculation, the pool return substantially decreased, dropping the return from one of the highest in the state to one of the lowest for the 1989–90 and 1990–91 seasons.

Herman Heise, an owner of Dearhart Groves, Raphael Viamonte, an owner of Vista, and Nancy Huff, an owner of Huff Groves, admitted that they had no understanding of how the calculations were made, but simply relied on Tuthill and Caulkins' previous larger pool returns. Their understanding was that Caulkins' change in ownership would not affect the growers.

Nevins contracted with Caulkins for the 1992–93 and 1993–94 seasons. Jesse Parrish, Nevins' president and owner, testified that he entered into the contract because of Caulkins' reputation in the industry. Nevins did not renew the contract for the 1994–1995 season, because of the low pool returns. Parrish admitted that he did not know how Caulkins had calculated its pool returns in the past, including how it determined interest expenses attributable to the pool or whether growers were credited with overyield.

In April 1996, Plaintiffs filed a breach of contract action against Caulkins, alleging Caulkins underpaid them on their contracts by incorrectly calculating the pool return. The following six claims were at issue during the jury trial: (1) Caulkins failed to include proceeds from the sale of overyield in computing the pool return (“Overyield”), (2) Caulkins failed to properly account for proceeds from the sale of foreign frozen concentrate in computing the pool return (“Export Gain”), (3) Caulkins improperly deducted grove operation costs from the pool return (“Grove Operations”), (4) Caulkins improperly deducted production and operating costs from the pool return (“Production and Operating Costs”), (5) Caulkins improperly deducted certain interest expenses from the pool return (“Extraordinary Interest”), and (6) Caulkins improperly utilized purchase accounting adjustments when calculating the pool return (“Accounting Adjustments”).

Plaintiffs' principal expert was Soneet Kapila, a forensic accountant. Although he did not have prior experience with the citrus industry, he familiarized himself with the terminology of the industry in order to understand, audit, and recalculate the pool returns. When auditing the pool returns for the relevant years, he discovered various errors, including errors in the allocation of revenue to individual growers based on the type of fruit that they contributed. He also discovered errors in general in the area of extraordinary interest, export gain, overyield, and production and operating costs, which are discussed in depth below. Based on his calculations, Kapila testified as to the total amount of damages that each Plaintiff suffered during each season.

Overyield

In order to increase the quality of juice in this state, Florida developed a juice extractor test. A state inspector tests the fruit arriving at a plant and gives a figure of pounds soluble solids per box that may be squeezed from the fruit. Initially, a factoring system was implemented, pursuant to which processors had to pay a fine when their juice yield exceeded the amount set by the state inspector. Eventually, technology allowed for the extraction of greater yields and the factoring system ended. Nevertheless, state inspectors continue to determine a yield amount. Overyield refers to juice extracted from fruit which exceeds the quantity set by the state inspector.

Prior to 1988, the revenue from overyield was credited to the pool return. Beginning in 1989, Caulkins began to retain a portion of overyield revenue. Andrew Taylor, Caulkins' chief financial officer, testified that Caulkins ultimately determined that the contract language allowed it to retain overyield and did not need modification. During the 1990–91 season and thereafter, Caulkins retained all of the overyield revenue. Taylor further testified that Caulkins could have always retained overyield pursuant to the contract, but had previously decided not to for competitive reasons. Kapila determined that overyield should have been credited to the growers and did so when recalculating the pool returns.

Export Gain

Caulkins imported fruit from Brazil for processing and exported concentrate for sale to Japan. In order to avoid paying a duty or tax, Caulkins' aim was to export and import the same quantities. The exported product resulted in higher profits than the domestic product. Prior to purchase by the French company, the export gain was credited to the pool return. However, after the change in ownership, Caulkins began to retain the export gain and not credit it to the pool return. Taylor, Caulkins' C.F.O., testified that Caulkins always had the right to retain the export gain but had not previously exercised that right. According to Devlin, the activity associated with importing fruit and exporting product was performed outside the role of processing fruit on behalf of growers and as a result the profit should not benefit the growers.

Kapila testified to the amount of damages Plaintiffs suffered as a result of Caulkins' failure to credit the pool return with the export gain. During cross-examination, Kapila admitted that he failed to deduct the import tax on Brazilian fruit when calculating the export gain. He explained that he credited the pool return with 100% of the export gain, based on the information received from Caulkins.

Production and Operating Costs

Plaintiffs argued that Caulkins improperly charged the pool with expenses related to the operation of VTF, its sister company. Stephanie Grey, a

receptionist of Caulkins, testified that Roger Barret, the chairman of the board of directors of Caulkins, divided his time equally between Caulkins and VTF. Taylor testified that Barret did some work for VTF, but worked for Caulkins the majority of the time. Taylor testified that Barret's salary and benefits were charged to the pool return because they constituted an operating expense for Caulkins. Taylor explained that both his salary and Lacene Orvis' salary were paid 60% by Caulkins and 40% by VTF, but that both worked 80% of the time for Caulkins and 20% of the time for VTF.

Extraordinary Interest

In December 1989, expectations for the 1990–91 season were that a harsh winter would result in a short supply of citrus causing an increase in the market price. In order to secure a supply of citrus, Caulkins entered into floor contracts with various growers, including Huff Groves and Vista Packing for the 1990–91 season. [Footnote omitted] The floor contracts guaranteed growers a minimum price for their citrus. Contrary to expectations, there was a large supply of citrus and the market price decreased, resulting in a loss to Caulkins on the floor contracts. As a result, Caulkins borrowed money from VNA, its parent company, in order to cover the losses. When calculating the pool return for subsequent seasons, Caulkins deducted interest on the borrowed funds. Plaintiffs argued that Caulkins breached the contract by deducting from the pool return interest on money borrowed on a prior season. Thomas Devlin, an auditing partner for Price Waterhouse who audited Caulkins, and Warren Tedder, a CPA, testified on behalf of Caulkins that interest is related to Caulkins' operation of the plant and as such may be charged to the pool under the contract.

Geoffrey Jones, a CPA who did accounting work for Caulkins in the late 1980s, testified that it was not appropriate to deduct from the pool return interest on money borrowed to pay off losses. Kapila also testified that this interest, which he referred to as extraordinary interest, should not have been charged to the pool.

Directed Verdict

At the conclusion of the Plaintiffs' case, Caulkins moved for a directed verdict against all Plaintiffs on all claims. With regard to Nevins Fruit, Caulkins argued that its claim was for the 1992–93 and 1993–94 seasons and by that time the pool returns were treated the same way as they were treated in the previous year and there was no testimony that Nevins expected the returns to be treated any differently. Nevins agreed that there was no evidence that Nevins had any knowledge of Caulkins' course of conduct before 1992–93 or had a course of dealings with Caulkins before 1992–93; however, Nevins argued that the contract unambiguously provided that the pool return should

have included revenue for overyield and evidence showed that instead Caulkins retained that revenue.

The trial court found that Nevins' contract with Caulkins was well after Caulkins had changed the way they calculated the pool return and there was no testimony that Nevins knew how Caulkins used to calculate the pool return prior to the transfer of ownership or had any expectation that the pool return would be calculated any differently than it was. Accordingly, the trial court granted Caulkins' motion for a directed verdict against Nevins as to all its claims. The trial court denied the motion as to the remaining Plaintiffs.

Jury Verdict

The jury ultimately returned a verdict in favor of Plaintiffs on the claims dealing with Extraordinary Interest, Export Gain, Overyield and Grove Operations, and in favor of Caulkins on the Production and Operating Costs and Accounting Adjustments claims. The jury allocated damages on each claim as follows:

Overyield:	Huff Groves—$292 Vista Packing—$19,767 Dearhardt Groves—$541
Export Gain:	Huff Groves—$539 Vista Packing—$24,711 Dearhardt Groves—$726
Extraordinary Interest:	Vista Packing—$8,933 Dearhardt Groves—$673

On the Grove Operations claim, the jury determined that Plaintiffs' damages amounted to $1.

The Extraordinary Interest, Export Gain and Overyield claims are the subject of Caulkins' appeal, while the Production and Operating Costs claim is the subject of Plaintiffs' cross-appeal. Nevins appeals from the directed verdict and final judgment the trial court entered against it at the conclusion of the Plaintiffs' evidence.

Caulkins argues that the jury's verdict that it breached the contract when it improperly accounted for extraordinary interest, export gain and overyield when calculating the pool return was not supported by substantial, competent evidence and is reversible on appeal.

A jury verdict that is supported by substantial, competent evidence is not reversible on appeal. Where there is conflicting evidence, the jury's verdict

should not be disturbed. *See Broward County v. Sattler,* 400 So.2d 1031, 1033 (Fla. 4th DCA 1981); *Espino v. Anez,* 665 So.2d 1080, 1081–82 (Fla. 3d DCA 1995); *Grossman v. Sea Air Towers, Ltd.,* 513 So.2d 686, 688 (Fla. 3d DCA 1987).

Caulkins does not dispute that the pool return was charged interest that was incurred on money borrowed from VTF to cover losses sustained from floor contracts. Caulkins contends the undisputed evidence at trial established that interest is an allowed expense under paragraph 6 of the fruit participation contract as "other income (deductions) net," and Plaintiffs failed to introduce evidence that the deduction of interest violated the terms of the contract. Paragraph 6 provides:

6. PRICE: Buyer agrees to process the fruit delivered hereunder into chilled juice or frozen concentrate, as it may elect. Said fruit shall be processed and sold together with all other participation fruit. From the net sales price of the finished product there shall be deducted the following:

(a) Buyer's actual operating expenses; including plant, storage, freezing, warehousing, selling, administrative, *other income (deductions) net,* etc., as determined by an independent audit.

(Emphasis added).

Generally, where the language of a contract is ambiguous, parol evidence is admissible to explain or clarify the intention of the parties. *See Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Co.,* 215 So.2d 336, 338 (Fla. 4th DCA 1968). It is not clear that the interest at issue here is a deductible operating expense as contemplated in paragraph 6. Thus, it was up to the jury to determine whether such interest was properly deducted by Caulkins as "other income (deductions) net."

Thomas Devlin, an auditing partner for Price Waterhouse who audited Caulkins, and Warren Tedder, a CPA, testified on behalf of Caulkins that interest is related to Caulkins' operation of the plant and as such may be charged to the pool under the contract. However, Geoffrey Jones, a CPA who did accounting work for Caulkins in the late 1980s, testified that it was not appropriate to deduct this interest from the pool return. Contrary to Caulkins' assertions, Kapila, Plaintiffs' expert, also explained that the interest on money borrowed from VNA to cover losses on floor contracts was improperly charged to the pool return. Thus, there was substantial, competent evidence to support the jury verdict as the conflict in the evidence was for the jury to determine.

Caulkins also contends that the amount of damages calculated by Kapila and relied upon by the jury when determining damages was not supported by the evidence. *See George Hunt, Inc. v. Dorsey Young Constr., Inc.,* 385 So.2d 732,

733 (Fla. 4th DCA 1980) (evidence as to the amount of damages cannot be based on speculation or conjecture, but must be proven with certainty) (citing *Hodges v. Fries,* 34 Fla. 63, 15 So. 682 (1894)). *See also Husky Indus., Inc. v. Black,* 434 So.2d 988, 992 (Fla. 4th DCA 1983) (an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data).

Kapila testified that he and his team audited Caulkins' pool return and determined what amount was improperly deducted as interest. He testified that his team made this determination after examining all the documents provided by Caulkins during discovery. Therefore, there was sufficient evidence from which Kapila could give an opinion and it was up to the jury to evaluate that opinion based on his credentials. We conclude there is no basis to reverse the jury verdict on this issue.

As to the export gains, Caulkins does not dispute that it did not credit the pool return with the gain derived from the sale of exported product. Caulkins contends there was insufficient evidence that it breached the contract by failing to include that gain in the pool return.

However, as Plaintiffs assert, the plain language of the contract provides that the pool return should have been credited with the export gain. Paragraph 6 provides:

> 6. PRICE: Buyer agrees to process the fruit delivered hereunder into chilled juice or f rozen concentrate, as it may elect. Said fruit shall be processed *and sold together with all other participation fruit. From the net sales price of the finished product* there shall be deducted ...

(Emphasis added). Paragraph 6 clearly provides that all fruit is to be processed and sold together and the price is to be computed from the net sales price of the finished product. Thus, the growers are entitled to the revenue generated from all the sales of the finished product, including that which is exported. If Caulkins wanted to deduct profit derived from exported product, it could have listed it as one of the enumerated deductions. Therefore, there was substantial, competent evidence that Caulkins breached the contract when it failed to credit the pool return with the export gain.

Caulkins further contends that the amount of damages computed by Kapila and relied upon by the jury was incomplete. Kapila testified to the amount of damages Plaintiffs suffered as a result of Caulkins' failure to credit the pool return with the export gain. During cross-examination, Kapila admitted that he did not deduct the tax imposed on imported fruit from Brazil when calculating damages. He explained that he credited the pool return with 100% of the export gain, based on the information received from Caulkins.

Kapila's admission that he did not deduct the import tax when calculating export gain damages does not render his calculation of damages incomplete. There was no evidence that the tax imposed on imports affected the profit derived from the sale of exported product. Further, the jury was asked, "[W]hat was the amount of damages, if any, suffered by the following plaintiffs resulting from a failure of Caulkins to include proceeds from the foreign sale of frozen concentrate in computing the price to be paid to pool participants?" The jury was not asked to deduct taxes imposed on imports from the proceeds from foreign sales. Thus, the amount of damages as determined by the jury was supported by competent, substantial evidence.

As to the issue of overyield, Caulkins does not dispute that it did not credit growers with revenue generated from overyield. Caulkins contends that the contract unambiguously provides in paragraph 4 that the grower is not entitled to credit for overyield and that no witness testified otherwise. Paragraph 4 provides:

4. TIME QUALITY: All determination as to classification or *quantity of fruit received and as to gallonage or pound solids, shall be fixed by the daily test made by Florida State Inspectors,* stationed at the premises of Buyer. After such inspections and acceptance of the fruit by Buyer, the fruit shall become the property of Buyer and Buyer's sole remaining obligation to Seller shall be for the payment of the price, as set forth herein.

(Emphasis added).

Plaintiffs acknowledge that the parties' course of dealing is inapplicable to this case. Plaintiffs contend that as recognized by the Uniform Commercial Code (UCC), evidence of usage of trade and good faith are relevant in construing the contract. Section 671.203, Florida Statutes (1995), provides that there is an obligation of good faith in the performance or enforcement of every contract. Section 671.205 provides that the usage of trade in which the parties are engaged gives particular meaning to supplement or qualify terms of an agreement.

However, where a contract is clear and unambiguous, the express contract terms may not be varied by resort to extrinsic evidence, including that related to the UCC obligation of good faith or custom and usage. *See Indian Harbor Citrus, Inc. v. Poppell,* 658 So.2d 605, 606 (Fla. 4th DCA 1995); *see also Farr v. Poe & Brown, Inc.,* 756 So.2d 151, 152–53 (Fla. 4th DCA 2000) (custom or usage may be employed to explain or qualify the terms of a contract that would otherwise be ambiguous, but not to contradict the express terms of a contract). The interpretation or construction of a contract that is clear and unambiguous is a matter of law that is reviewed *de novo. See Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A.,* 771 So.2d 628, 631 (Fla. 4th DCA 2000).

The contract is not ambiguous with regard to whether growers should be credited with overyield. Paragraph 4 clearly provides that the quantity of the fruit delivered is fixed by the test of the state inspector. The testimony at trial established that "overyield" refers to juice extracted from fruit which exceeds the quantity set by the state inspector. Thus, the express terms of the contract clearly and unambiguously allow Caulkins to retain overyield, and it was error for the jury to consider the concepts of usage of trade or good faith in interpreting the contract. Therefore, Caulkins did not breach the contract when it retained overyield in calculating the pool returns and Plaintiffs are not entitled to damages in this regard.

* * *

We reverse the directed verdict granted in favor of Caulkins against Nevins except as to Nevins claim for overyield damages and remand for a new trial. With respect to the jury verdict and final judgment, we affirm in all respects except as to the Plaintiffs' claim for overyield damages and direct the court to enter judgment for Caulkins on the claim for breach of contract for overyield damages.

CMM Approach: Problems often arise as original contracting parties are substituted with new ones who have different practices, views, and needs. It is helpful to note how many cases involve the introduction of a new party and also that it is the intent of the original parties that controls (often via a post-formation modification or novation).

B. Restatement (Second) § 203: Standards of Preference in Interpretation

The first rule mentioned on subsection (a) of what follows is a third-tier rule of construction. The second is a proper hierarchy applicable to interpretation of terms in a contract that are questioned. According to subsection (b), reliance on the terms of the contract itself, perhaps as by clarifying express terms by other terms in the contract (the *four corners* rule), is the first mechanism to utilize. If the first step fails, resort to the remainder, in order of their hierarchy, is appropriate. Subsection (c) is another rule of construction, as is subsection (d). The latter two cover the situation where there is some conflict between included terms and the question is which one takes precedence.

Restatement (Second) § 203: Standards of Preference in Interpretation

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

(a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;

(b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;

(c) specific terms and exact terms are given greater weight than general language;

(d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.

NEUMAN v. FERRIS

District Court of Appeal of Florida, Fourth District, 1983

432 So. 2d 641

DELL, Judge.

Appellant Ronald Henry Neuman challenges a final judgment and supplemental order clarifying the final judgment entered in an action to foreclose a purchase-money mortgage.

Appellant executed a promissory note secured by a purchase-money mortgage. Although the promissory note provided for payment of the monthly installments at 1901 North Atlantic Boulevard, it did not specify the method of delivery nor the mode of payment. Shortly after execution of the note, appellees' attorney directed appellant in writing as follows:

> *Checks* are to be made payable to George W. Ferris, Jr. and Alice O. Ferris *and mailed* to 1901 North Atlantic Boulevard Apartment 5B–S–Fort Lauderdale, Fla. in the sum of $310.00, commencing December 1, 1977, and are to be paid on the 1st day of each and every month thereafter. [Emphasis added.]

Appellant complied with appellees' directions and mailed his personal checks in payment of the mortgage and note for a period of approximately four years. In October of 1981, appellant mailed his personal check for the October payment but misaddressed the envelope. He discovered his error on October 30th, when the envelope containing the October payment was returned. He

telephoned appellees to advise them of the circumstances and informed them that he would enclose both the October and November payments in the next day's mail. He mailed both the October and November payments on October 31st. On November 3rd, appellees instituted a foreclosure action on the mortgage and exercised their option to accelerate all amounts due. Appellees received the payments.

Following a non-jury trial on the merits, the trial judge entered a final judgment which denied appellees the relief sought under their foreclosure action, granted appellees one-half of their attorneys fees and costs and ordered appellant to make all payments current with interest. On appellant's motion for clarification, the trial court supplemented the findings made in the final judgment by further finding that appellant was in default on his October payment and that personal checks did not constitute proper payment under the mortgage. The trial court ordered appellant to mail his payment so that the payments would be in the hands of the appellees before the expiration of the thirty day grace period and further directed appellant to make such payments "by cash, cashier's check or other equivalent type of payment." Appellant timely appealed from this order.

Appellant contends that the trial court erred in finding the mortgage in default and argues that he completed timely payment of the October and November payments when he deposited them in the U.S. mail on October 31st. Appellant also asserts that payment by personal checks accepted without protest over a period of four years became an approved mode of payment, and that the court exceeded its jurisdiction when it required him to make payments by cash, cashier's check or other equivalent type of payment. Appellant also challenges the award of one-half of appellees' attorneys fees and interest calculated at the default rate which amounted to $321.55.

The trial court properly refused to grant an order of foreclosure. However, the trial court erred when it found that a default had occurred. We agree with appellant's contention that since appellees directed delivery by mail, deposit of the October and November payment with the U.S. mail constituted delivery of the checks.

> It has been held in well reasoned cases that by depositing a note in the mail with the intent that it should be transmitted to the payee or the assignee in the usual way, the maker or assignor parts with his domination and control over it, and it and the delivery is in legal contemplation complete.

Wiers v. White, 142 Fla. 628, 196 So. 206, 209 (1940). Appellant complied with the express instructions of appellee. Therefore, the deposit of the October check with the U.S. mail on the last day of the grace period constituted timely delivery of that check to appellees.

Generally, the tender of a personal check does not constitute the equivalent of cash or “legal tender,” but rather is treated as a conditional payment. The Supreme Court noted in *Cowen v. Indianapolis Life Insurance Co.,* 116 Fla. 814, 157 So. 180 (1934):

> We are not unmindful of the rule that in the absence of an agreement to the contrary, the acceptance by a creditor of a check, whether it be a cashier's check, certified check, or the debtor's check, or the check of a third person, and the surrender of the evidence of indebtedness and the giving of a receipt do not constitute payment per se.

Id. 157 So. at 182.

> Neither the mortgage nor the note defined the specific mode of payment. However,
> [a]s between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as part of the same transaction ....

§ 673.119, Fla.Stat. (1981).

The written instructions by appellees' attorney specified payment by “checks.” The actions of the parties clearly demonstrate that payment by personal check constituted the accepted mode of payment.

> Where the terms of a written agreement are in any respect doubtful or uncertain, or if the contract contains no provision on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court, upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract.

Shouse v. Doane, 39 Fla. 95, 21 So. 807, 810 (1897).

> A “course of dealing” is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

§ 671.205(1), Fla.Stat. (1981).

After instructing appellants to pay by “check” appellees accepted forty-six payments by personal check without objection. The course of dealings between the parties evidences the fact that payment by personal check constituted an approved mode of payment.

Under the circumstances of this case, we must conclude that the trial court erred in awarding relief to appellees in the form of interest, costs and attorneys fees and in restricting the mode of payment for the parties' future course of dealing. Appellant did not default on the mortgage. He made payment consistent with the directions of appellees' attorney and consistent with the course of conduct established by the parties as to the mode of payment.

Therefore, we reverse the final judgment and supplemental order clarifying the final judgment and we remand this cause for entry of judgment in favor of appellant.

REVERSED and REMANDED.

Problem 15-1

Contractor remodels many homes in the area, and she relies upon a bevy of artisans (painters, plumbers, landscapers, electricians, carpenters, etc.) to assemble the teams that she needs to professionally complete each remodeling project. Contractor nearly always uses Painter and has been doing so for a decade. In that time, Contractor has always included in the various contracts with Painter that Painter would start her part of a project within seven days of signing a contract since short completion times are something that Contractor’s clients appreciate. The other contractors in the area adhere to a two-week commencement period with their contractors, measured from the date of signing of the respective agreement with Contractor. A recent and serious economic downturn caused virtually all homeowners to cancel, or postpone, remodeling. Contractor’s business reached a complete standstill for about half of a year and she cancelled all of her outstanding contracts with her artisans (a few sued, but most understood the market and ended the contracts harmoniously). (*cont.*-)

Fortunately, recent economic data signaled a major economic turnaround and Contractor’s phone rang off the hook with remodeling offers that had been put on hold. With regard to her very first big remodeling job after the recovery for Client, Contractor sent Painter a contract that she had asked her legal counsel

to revise. Rather than include the seven-day commencement provision, the revised contract called for commencement of projects "in accordance with the individual remodeling project to which this Agreement relates." Painter signed the new contract, and because she needed a week and a half to purchase new paint brushes and other supplied, Painter commenced the painting 12 days after the signing of the contract.

Discerning that the remodeling project would not be done in time for his daughter's wedding, Client fired Contractor. Contractor in turn sued Painter for lost profits on Client's contract because it was Painter's late start that precipitated Client's decision to fire Contractor.

Discussing each of the factors listed in Restatement (Second) Contracts § 203(b), which is the most likely to determine Contractor's and Painter's rights in this dispute, and why?

CMM Approach: again, we see that the common-law approach (here, set out in Restatement (Second) Contracts § 203(b)) tracks virtually exactly with the standard utilized by the U.C.C. (here, U.C.C. § 2-202(b), FLA. STAT. § 672.202(1) (2017)). Why memorize two sets? Under exam conditions, this is a case where the same analysis may be used so long as the writer is clear on whether it is a common law question or a sale-of-goods question. As a shortcut, use of the U.C.C. standards and its hierarchy is a good bet in all cases that involve a parol evidence/interpretation question, including the U.C.C. terminology. Simply be clear up front that you are dealing with (a) a common law (set of) issue(s) or, where appropriate, (b) sale-of-goods issue(s).

This brings up another 'trick': reasoning by analogy. A fact pattern may fall squarely in one category (common law vs. sale-of-goods), but use of the other category's rules seems like the proper thing to do. Simply make very clear what you are doing; either, "Though this is a common-law issue, reasoning by analogy to sale-of-goods rules is helpful," or, "Though this is a sale-of-goods issue, the analogy to common-law rules is helpful…" Also do not forget that where the U.C.C. (and Florida's adoption) does not cover something, one supplements with common-law rules. In other words, in the last case, it is not reasoning by analogy, but supplementation of sale-of-goods rules by common law ones.

2. Conduct of the Parties as Evidence of Intent

How parties conduct their activities is a good source of evidence for proving the parties' intent. Though not always clear, the organization below follows from more intrinsic to more extrinsic to the parties' actual contractual language and activities.

A. Course of Performance

Sometimes parties agree on many of the primary contractual terms, but they leave for later discussion and agreement some of the terms. A good example would be the order of a large shipment of raw materials that the buyer stockpiles. As reserves of the raw material dwindle, a buyer knows to order more. The lower the reserves, the greater the need to ensure agreement on a timely delivery in the near term. The greater the reserves, the less important it is to concretely agree on the delivery date of replacement reserves; in fact, it could be left to a later phone call or email. In those cases where a dispute arises, how the parties act in relation to the contract at hand is particularly germane. Compare the following examples:

> **Example 1**: Manufacturer uses 100 tons of iron ore per year, at relatively stable monthly rates. Manufacturer has a contract with Supplier for 100 tons of iron ore per year in deliveries of from 5-10 tons, though the dates of delivery are not set out in writing. With iron ore reserves dwindling in a high production month, Manufacturer emails Supplier to send between 5 and 10 tons in the next shipment.
> **Example 2**: Manufacturer uses 100 tons of iron ore per year, at relatively stable monthly rates. Manufacturer has a contract with Supplier for 100 tons of iron ore per year in deliveries of from 5-10 tons, though the dates of delivery are not set out in writing. With iron ore reserves dwindling in an unexpectedly high production month, Manufacturer sends its own ships to Supplier's port for pick-up of 10 tons of iron ore. Can you see the urgency, and therefore the message, which differentiates Example 2 from Example 1? (A key term of art is *for accommodation only*.)

Problem 15-2

Rosa's Red Roses, a world-renowned flower shop known for specializing in the exclusive sale of red roses, contacted Frank's Wholesale Flowers to furnish its roses for a year. This contract would be performed every month in the amount of 100 roses at a price of $1 per rose. The parties reduced their agreement to writing and, for the first three months, both parties were completely satisfied. During the fourth month, Frank's Wholesale Flowers sent Rosa's Red Roses 50 red roses and 50 pink roses instead of the 100 red roses. Rosa's Red Roses immediately rejected the shipment and demanded repayment for non-

conforming goods. Was Rosa's Red Roses incorrect for rejecting the fourth month's shipment? Would your answer change if Frank's Wholesale Flowers had sent Rosa's Red Roses a letter letting it know that Frank's Wholesale Flowers was substituting half of that month's shipment with pink roses due to a nation-wide shortage of red roses? *See* FLA. STAT. § 672.206 (2017) and FLA. STAT. § 672.208 (2017).

B. Course of Dealing

If the parties to a dispute have had long-standing contractual dealings, why not look at how they have operated in the past? Would that not reflect their intentions regarding things like shipping dates and the setting of price terms linked to standardized market valuations? The appeal to using established practice as a way to identify the parties' intentions relating to a new contract with a missing term is compelling.

> **Example**: Manufacturer and Supplier have agreed to a new contract pursuant to which Manufacturer will buy its requirements of a specific raw material for the next year, orders being made monthly based on the month-to-month variable needs. The parties did not set out a specific price term. When Supplier sends an invoice for a very high amount, Manufacturer refuses to pay it. Supplier brings suit. Because the parties have always used the end-of-month market price published by the industry as the base in past dealings, with a 15% profit, the court rules that the price is quantity times end-of-month price for the relevant month, with a 15% addition for profit.

Problem 15-3

Andy's Appliances sent a purchase order to Microwave Warehouse to purchase 20 microwaves at a price of $50 each. Microwave Warehouse sent an order receipt and the shipment was immediately sent out for delivery. Since Andy's Appliances has been purchasing its appliances from Microwave Warehouse for the past ten years, the two businesses are under a mutual understanding to ship orders to the East Andy's Appliances location instead of the West Andy's Appliances location, since that is where the majority of its business is conducted. Unbeknownst to Microwave Warehouse, the East Andy's Appliances location was being renovated and all business was being conducted at the West Andy's Appliances location. The microwaves were timely delivered to the East location. Andy's Appliances had to spend $100 of its own funds to pick up the microwaves and deliver them to the West Location. Would Andy's Appliances be successful in recovering the $100 additional cost from Microwave Warehouse? Would your answer change if Andy's Appliances had sent a follow-up email to Microwave Warehouse after

their purchase order had been sent informing Microwave Warehouse of the change in delivery location?

C. Usage of Trade

NATIONAL MERCHANDISE CO., INC. v. UNITED SERVICE AUTO. ASS'N

District Court of Appeal of Florida, First District, 1981

400 So. 2d 526

PER CURIAM.

The appellants, National Merchandise Co., Inc. (Pic-N-Save Drug Stores) and Maryland Casualty Co., seek reversal of a summary judgment granted to appellee, United Services Automobile Association (U.S.A.A.). We are asked to review U.S.A.A.'s plain language, simplified insurance policy, providing coverage for bodily injury incurred due to an "auto accident." The alleged "auto accident" involves a four-year old child who ingested drugs while seated in the insured's car and later expired. The trial judge granted summary judgment based upon his determination that the death of the child did not result from an auto accident and was, therefore, not within the coverage of the policy. Our review of the record and the applicable law leads us to a contrary conclusion. We therefore reverse.

A brief review of the facts as disclosed by the pleadings, exhibits and depositions is essential to the disposition of this appeal. During 1978, Paul Cohen worked for Pic-N-Save as a pharmaceutical supervisor in Jacksonville. One of his duties was to transfer drugs from one retail outlet to another. For this purpose, he used his station wagon, but Pic-N-Save reimbursed him for car insurance, gas, and repairs. Cohen indicated in a deposition that it was not unusual for him to leave drugs in his car overnight or over a weekend, although this procedure was apparently unknown to Cohen's supervisor. Cohen spent a lot of time on the road, since he supervised and delivered drugs to eight different stores in North Florida and South Georgia.

On Wednesday, June 14, 1978, Cohen picked up some drugs from one of the Jacksonville stores. The drugs remained in his car Wednesday, Thursday and Friday. During working hours on Friday, June 16, he decided to stop by his home to estimate how much cement he would need to put up a wall in his back yard. At home he found his nephew, David, age four, and his niece, age two. Since they wanted to go for a ride with him, he took them to the hardware store. He was in the store for about ten minutes, while the two children waited

in the car. Some drugs remained in a bag on the front floorboard on the passenger side of the car. When he returned, he found the drugs had been moved. Fearing that the children had done something with the drugs, he questioned them as to whether or not they had touched the drugs. They apparently assured him that they had not touched the drugs.

Cohen then drove home, dropped off the children and the cement, and returned to his job duties. He returned home at 5:30 p. m. and found his nephew lying on the couch, having convulsions. He realized that young David had apparently taken some of the drugs while in the car earlier. A rescue squad was called. David was taken to the hospital, where he died.
A wrongful death claim was subsequently filed by David's parents alleging that David died as a result of taking a prescription drug while a passenger in defendant Paul Cohen's car. David's parents sued Paul Cohen, Pic-N-Save, and Pic-N-Save's insurance carrier (Maryland Casualty Co.). Pic-N-Save filed a number of third-party claims. One of the claims was against U.S.A.A., the appellee, as the insurer of Paul Cohen's car. U.S.A.A. moved for summary judgment, stating that because of the wording of its policy it could not be held liable. The trial judge granted U.S.A.A.'s motion.

U.S.A.A.'s potential liability is based upon the interpretation of a clause in the appellee's policy known as "The Easy Reading Auto Policy." The policy is ten pages long with nine pages of special endorsements and provisions relevant to Florida coverage. The ten-page standard policy is in large, neatly-spaced type. Various sections are clearly set off from each other, and each section is titled in distinct, bold block letters. Each subsection has titles with slightly smaller bold black lettering. Various key words and phrases are in small bold type and defined elsewhere in the policy.

"Part A Liability Coverage" on page one states: "We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident " (emphasis supplied). Unfortunately, the term "auto accident" is not defined in the policy nor by law. The appellees claimed that young David's death was not due to an "auto accident." Their contention, with which the trial judge agreed, is that although the accident occurred in the auto, the auto was merely the situs and not causally related to the accident. Before discussing that issue, we offer the following comments on the "Easy Reading Auto Policy" and its relationship to this case.

* * *

U.S.A.A. argues that a common-sense reading of its "plain language" policy, which provides coverage for "auto accidents," does not cover situations such as occurred in this case. On the other hand, the appellants advocate the view that the term "auto accident" in the simplified insurance policy is

ambiguous. When the terms used are ambiguous, we are required to construe the policy against U.S.A.A., because it drafted the policy. *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla.1979); *Travelers Insurance Co. v. Smith*, 328 So.2d 870, 872 (Fla. 3rd DCA 1976). Insurance policies are contracts, and it is well-established that contracts are construed against the drafter in the face of any ambiguities. *Planck v. Traders Diversified,* Inc., 387 So.2d 440, 441 (Fla. 4th DCA 1980); *Hurt v. Leatherby Insurance Co.*, 380 So.2d 432, 434 (Fla.1980). "This rule is especially true when the drafter stands in a position of trust, or greater professional or business knowledge...." Planck, supra, at 442. If the insurer wishes to condition its contractual liability upon the insured's conformance with certain conduct, it must do so in clear, unambiguous language. *Holz Rubber Co. Inc. v. American Star Insurance Co.*, 14 Cal.3d 45, 120 Cal.Rptr. 415, 423, 533 P.2d 1055, 1063 (1975).

Although the words "auto" and "accident" have definite or generally accepted meanings, these two words simply do not convey a meaning so clear and precise, for liability insurance coverage purposes, that one can determine whether a given accident, under many easily imagined circumstances, would or would not be covered. In this sense, the terms are "ambiguous," hence the need for construction or interpretation. *Roberson v. United Services Automobile Association*, 330 So.2d 745 (Fla. 1st DCA 1975); *Southside Motor Co. v. Transamerica Ins. Co.*, 380 So.2d 470 (Fla. 1st DCA 1980); *Ellenwood v. Southern United Life Ins. Co.*, 373 So.2d 392 (Fla. 1st DCA 1979).

The insurer cannot, by failing to define the terms "auto accident" or to include any additional qualifying or exclusionary language, insist upon a narrow, restrictive interpretation of the coverage provided. See Roberson and Southside Motor Company, supra. Furthermore, while we acknowledge the duty to give effect to the "plain language" of the policy, automobile insurance litigation is infused with considerations of public policy, and our determination of the rights and obligations of the parties must also take into consideration relevant legislative enactments, established custom and usage in the insurance industry, and the body of case law touching upon coverage questions similar to the one before us.

* * *

In Section 627.727(1), Florida Statutes (1979), the Legislature has directed that uninsured vehicle coverage be provided in auto insurance policies delivered in this state. This coverage must be supplied in any "automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle ..." Id. Likewise, personal injury protection "arising our of the ownership, maintenance, or use of a motor vehicle" is required in auto policies. Section 627.736(1), Florida Statutes (1979). See also Sections 627.737(1) and 627.7372, Florida Statutes. This terminology is

not only standardized in the industry, but we perceive it as expressive of the public policy of the state insofar as auto accident insurance protection is concerned.

Thus, confronted with a term that is standardized in the industry, we must recognize the principle that "usage of trade which is so well settled and generally known that all persons engaged in such trade may be considered as contracting with reference to it, has been regarded as forming a part of a contract of insurance entered into to protect risks in such trade." 13 Appleman, Insurance Law and Practice, s 7388 at 189 (1976). Commercial transactions and contracts should be interpreted in light of custom or trade usage. *Carr v. Stockton*, 84 Fla. 69, 92 So. 814, 815 (1922); *Fred S. Conrad Construction Co. v. Exchange Bank*, 178 So.2d 217, 221 (Fla. 1st DCA 1965). Since we are also confronted, as we have indicated, with the statutory policy pronouncements that auto insurance coverage is extended to accidents "arising out of the ownership, maintenance or use of a motor vehicle," we must be guided further by the principle that the law of this state is a basic ingredient of every contract. *Board of Public Instruction v. Bay Harbor Islands*, 81 So.2d 637 (Fla.1955). The law in existence at the time of the making of a contract forms a part of that contract, as if it were expressly referred to in its terms. *General Development Corp. v. Catlin*, 139 So.2d 901, 903 (Fla. 3rd DCA 1962).

* * *

We therefore conclude that the trial court erred in determining as a matter of law, under the facts as we have reviewed them, that no coverage was provided under U.S.A.A.'s policy. The judgment is reversed and this cause is remanded for further proceedings.

Problem 15-4

Gary owns a fitness center and recently purchased ten of the most commonly-used treadmills on the market, the "TreadPro 1000." Gary needed to purchase longer power cords for the treadmills, so he contacted Fitness Equipment Wholesale, who gave him a price of $10 per cord. Gary then sent the following email to Fitness Equipment Wholesale: "1 am placing an order for ten, 15-foot power cords for my TreadPro 1000's at a price of $10 each." Fitness Equipment Wholesale delivered ten, 15-foot power cords to Gary, but these cords had two prongs whereas the TreadPro 1000 requires a cord with three prongs. Although Gary did not specify the prong requirements, is Fitness Equipment Wholesale in breach for non-conforming delivery? (Further, does a "formation" issue or two suggest itself? If not particularly important here, but later on an exam?)

3. Statutory Interpretation – Similarities to Contractual Interpretation

This book attempts several "firsts," including instruction in a first-year contracts course by use of Florida state law. (This book, taken at a faster pace, would also serve as a specialized, upper-level elective covering Florida contract law). In the preceding Chapter, the point is made at least very clearly, if not for the first time, that contact interpretation should be subjected to a somewhat rigid order in the use of the rules, i.e., requiring failure of a prior rule to answer the ambiguity before moving to the next, more "extrinsic," rule. It is not often, if ever, that criminal cases have been addressed in contracts books. Nevertheless, the analogy between contract interpretation and statutory construction is so close, and therefore so compelling, that for purposes of memory and of understanding, treatment of statutory interpretation merits coverage at this stage. Further, whereas explanatory text typically precedes a case by way of introduction, in this instance the primary information will be included in a paragraph following this case.

BAUTISTA v. STATE

Supreme Court of Florida, 2003

863 So. 2d 1180

BELL, J.

We have for review *Bautista v. State*, 832 So.2d 122 (Fla. 4th DCA 2002), in which the Fourth District Court of Appeal certified the following question as one of great public importance:

DOES THE "A/ANY" TEST ADOPTED IN GRAPPIN 5. STATE AND STATE 5. WATTS AS THE METHOD FOR DETERMINING THE UNIT OF PROSECUTION FOR THE COMMISSION OF MULTIPLE PROSCRIBED ACTS IN THE COURSE OF A SINGLE EPISODE, PRECLUDE MULTIPLE CONVICTIONS FOR DUI MANSLAUGHTER WHERE MORE THAN ONE DEATH OCCURS IN A SINGLE ACCIDENT AS APPROVED IN MELBOURNE 5. STATE?

Bautista, 832 So.2d at 125.[1] We have rephrased the question to be:

DOES THE "A/ANY" TEST ADOPTED IN GRAPPIN 5. STATE AND STATE 5. WATTS PRECLUDE MULTIPLE CONVICTIONS OF DUI MANSLAUGHTER WHERE MULTIPLE DEATHS OCCUR IN A SINGLE DUI CRASH?

For the reasons stated below, we answer the certified question in the negative and hold that multiple convictions of DUI manslaughter may arise from multiple deaths in a single DUI crash.

27. BACKGROUND

David Bautista was driving under the influence of alcohol when his vehicle collided with another car, fatally injuring its two occupants.[2] He was convicted on two counts of DUI manslaughter. Bautista appealed, arguing that since the DUI manslaughter statute penalizes the killing of “any human being” rather than “a human being,” the statute does not authorize multiple convictions based on two deaths arising from a single DUI incident. Relying on *Melbourne v. State*, 679 So.2d 759 (Fla.1996), where this Court held that multiple convictions arising from a single DUI incident did not violate double jeopardy principles, the Fourth District Court of Appeal affirmed the convictions. The district court concluded that Bautista's claim, although not based on the principle of double jeopardy, was nonetheless foreclosed by this Court's language in Melbourne.

2. DISCUSSION

The DUI manslaughter statute, section 316.193(3)(c)(3), Florida Statutes (2002), provides:

> Any person:
>
> 20. Who is in violation of subsection (1) [driving under the influence];
>
> 21. Who operates a vehicle; and
>
> (c) Who, by reason of such operation, causes or contributes to causing:
>
> ...
>
> 3. The death of any human being commits DUI manslaughter ....

Id. (emphasis added).

Relying on the “a/any” test developed in *Grappin v. State*, 450 So.2d 480 (Fla.1984), and *State v. Watts,* 462 So.2d 813 (Fla.1985), Bautista argues that because the adjective “any” modifies “human being” in the statute, the killing of multiple persons in a single DUI incident constitutes a single offense of DUI manslaughter.

A. The “A/Any” Test

To properly resolve the certified question, we must first trace the history and purpose behind the “a/any” test. In *Grappin,* we were confronted with a decision of the Second District Court of Appeal that was in direct conflict with decisions from two other district courts of appeal. The issue presented was the Legislature's intended unit of prosecution for the theft of a firearm under subsection (2)(b)(3) of Florida's general theft statute. § 812.014, Fla. Stat. (1979). Employing what it called “a common sense reading of the plain language of section 812.014(2)(b),” the Second District determined that such a reading demonstrates “that the legislature unmistakably intended for the simultaneous unlawful taking of more than one firearm to be subject to a separate prosecution.” *State v. Grappin*, 427 So.2d 760, 763 (Fla. 2d DCA 1983) (emphasis added), *approved,* 450 So.2d 480 (Fla.1984).

Section 812.014(2)(b), Florida Statutes (1979), read as follows:

> (b) It is grand theft of the second degree and a felony of the third degree ... if the property stolen is:
>
> 1. Valued at $100 or more, but less than $20,000.
>
> 2. A will, codicil, or other testamentary instrument.
>
> 3. A firearm.
>
> 4. A motor vehicle.
>
> 5. Any member of the genus Bos (cattle) or the genus Equus (horse), or any hybrid of the specified genera.
>
> 6. Any fire extinguisher.
>
> 7. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.

(Emphasis added.)

The Second District noted that the Legislature's enactment “prefaced the respective item of property in parts 2 through 4 of subsection (2)(b) with the article ‘a’.... In contrast, it prefaced the respective object of property in parts 5 through 7 with the article ‘any.’ ” *Grappin*, 427 So.2d at 762–63. The Second District believed the Legislature's differing use of “a” and “any” was intentional. It stated:

> We do not believe that the legislature inadvertently inserted different articles in parts 2 through 4 and 5 through 7. In our view,

> the legislature's use of the article “a” in parts 2 through 4 reveals its recognition of the distinction in meaning between the articles “any” and “a” for purposes of establishing the permissible unit of prosecution. In other words, its use of different articles signifies its intent, with respect to simultaneously pilfered firearms ... to treat separately each stick in the bundle.

Grappin, 427 So.2d at 763 (footnote omitted)(emphasis added). The Second District buttressed its determination of legislative intent in two ways. First, it looked at the overall statutory scheme relative to firearms. It found that firearms are subject to strict, comprehensive statutory regulation and that in light of the “strong policy considerations” within this statutory scheme, “it is unreasonable to presume that the legislature intended to make simultaneously stolen firearms (or motor vehicles or testamentary instruments) cheaper by the dozen.” *State v. Grappin*, 427 So.2d at 763. Secondly, the Second District looked at related cases. It cited several federal cases interpreting the intended unit of prosecution under federal firearm statutes that used either “a” or “any.”

We acknowledged the Second District's use of a common-sense approach in its interpretation of this statute and approved its decision. In fact, we employed the same common-sense approach in our own interpretation. We acknowledged that the Legislature must fix the punishment for violation of statutes clearly and without ambiguity. If there is ambiguity, we said that the rule of lenity applies to resolve the ambiguity against turning a single transaction into multiple offenses. But we also stated that “[w]here legislative intent as to punishment is clear ... the rule of lenity does not apply.” *Grappin*, 450 So.2d at 482. To reach a common sense interpretation of the legislatively intended unit of prosecution, we used the same basic analysis as the Second District. First, we looked at the various uses of “a” and “any” within the statute itself. Next, we looked at our prior interpretation of the same statute in *State v. Getz*, 435 So.2d 789 (Fla.1983). Lastly, we looked at decisions of other courts. We looked at federal court cases faced with similar questions of statutory interpretation. As did the Second District, we found that our construction was consistent with federal circuit court decisions construing similar federal statutes that used either “any” firearm or “a” firearm. Ultimately, by applying this common-sense approach to statutory interpretation, we found “that the use of the article ‘a’ in reference to ‘a firearm’ in section 812.014(2)(b) 3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution.” *Grappin*, 450 So.2d at 482.

Eight months after *Grappin*, we applied the a/any test in *Watts* and held that a prisoner could only be charged with one count of possession of contraband based on his possession of two prison-made knives discovered in his cell at the same time. *Watts*, 462 So.2d at 814. The contraband statute in *Watts*

prohibited possession by an inmate of "[a]ny firearm or weapon of any kind." 462 So.2d at 814 (quoting section 944.47, Florida Statutes (1981)).[3] In the *Watts* opinion, even though a completely different statute was at issue, there is no discussion of the common-sense approach to statutory interpretation employed in *Grappin* to determine the legislatively intended unit of prosecution. The Watts opinion simply extrapolates the a/any distinction specifically derived from section 812.041(2)(b) to a wholly unrelated statute. The prison contraband statute contained no variant uses of "a" or "any" before the prohibited items of property. Section 944.47 consistently used "any" before each item listed. So, unlike section 812.041(2)(b), within section 944.47 itself there was no clear expression of legislative intent as to the unit of prosecution. Unlike the *Grappin* decision, the Watts opinion does not discuss either the overall statutory scheme relative to contraband, the public policy behind the statute, or how other courts have interpreted similar statutes.

Therefore, when the *Watts* opinion stated that it was "applying the rationale of *Grappin* to" section 944.47, it actually was only applying a portion of the *Grappin* rationale. *Watts*, 462 So.2d at 814. There was no effort to find the legislatively intended unit of prosecution. Only the syntactical distinction between "a" and "any" was used to find ambiguity and thus apply the rule of lenity. Consequently, applying only the a/any rationale of *Grappin*, we held that the use of "any" created an ambiguity as to the intended unit of prosecution and this ambiguity precluded the State from charging multiple counts based on the defendant's simultaneous possession of multiple items of contraband. *Watts*, 462 So.2d at 814.

Twelve years later in *Wallace v. State*, 724 So.2d 1176 (Fla.1998), we held that a defendant who resisted two officers during a single incident could be charged with only one crime because the statute prohibited resisting "any" officer. Id. at 1181. We analyzed the language of section 843.01, Florida Statutes (1993), which provides:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Id. (emphasis added). We ultimately determined that the case should be resolved in accordance with our decisions in *Grappin* and *Watts*. In reaching this conclusion, we relied in part on the United States Supreme Court's analysis of a similar federal resisting arrest statute. *Wallace*, 724 So.2d at 1179 (*citing Ladner v. United States*, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958)). *Ladner* had permitted only one offense regardless of the number of officers affected. We explained the Court's conclusion in Ladner as follows:

"Because the meaning of the statute could not be discerned from the wording of the statute or its legislative history, the Court construed the statute in favor of the accused individual." *Wallace*, 724 So.2d at 1180. We also noted that *Ladner* reached its result because the Court concluded that the statute's "primary purpose was to prevent the hindrance of government duty, and not to prevent assault upon federal officers." *Id.* at 1179. We found that the Florida Legislature had a similar purpose in enacting section 843.01. Noting that chapter 843 is entitled "Obstructing Justice," we concluded that this context indicated a legislative focus on the obstruction of justice by resisting arrest and not just the physical protection of law enforcement officers. *Wallace*, 724 So.2d at 1180. Essentially, our analysis of the statutory language and related case law in *Wallace* led us to conclude that "[a]t the very least, under the analysis in the cases set out above, the language and purpose of the statute is ambiguous and susceptible to different interpretations." *Wallace*, 724 So.2d at 1180 (emphasis added). Within this context, we held that a continuous resistance to an ongoing attempt to effect an arrest constitutes only a single "instance of obstruction" under section 843.01, Florida Statutes. *Wallace*, 724 So.2d at 1180–81. We applied the rule of lenity because the language and the purpose of the statute did not indicate a clear legislative intent to permit separate prosecutions of resisting separate police officers during one episode.[4]

B. DUI Manslaughter—A Homicide Offense

Applying the same common-sense approach to statutory interpretation that we used in *Grappin* to the DUI manslaughter statute at issue in this case, we believe that the Legislature clearly intended to permit multiple convictions based on multiple deaths arising from a single DUI incident.

Our purpose in construing a statutory provision is to give effect to legislative intent. Legislative intent is the polestar that guides a court's statutory construction analysis. *State v. J.M.*, 824 So.2d 105, 109 (Fla.2002). In attempting to discern legislative intent, we first look to the actual language used in the statute. *Joshua v. City of Gainesville*, 768 So.2d 432, 435 (Fla.2000). If the statutory language is unclear, we apply rules of statutory construction and explore legislative history to determine legislative intent. *Id.*; *Weber v. Dobbins,* 616 So.2d 956, 958 (Fla.1993). "To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute." *State v. Anderson*, 764 So.2d 848, 849 (Fla. 3d DCA 2000) (*citing McKibben v. Mallory*, 293 So.2d 48, 52 (Fla.1974)).

Despite its inclusion in chapter 316 with motor vehicle offenses, DUI manslaughter falls within the general category of homicide offenses. *See Houser v. State*, 474 So.2d 1193, 1196 (Fla.1985) (stating that the statutory

element of the death of a victim places DUI manslaughter "squarely within the scope of this state's regulation of homicide*"); McHugh v. State*, 160 Fla. 823, 36 So.2d 786, 787 (1948) (stating that the "gist" of the DUI manslaughter offense is "unlawful homicide"). The first enactment of the DUI manslaughter statute in 1923 provided that violations of the statute were to "be punished as provided by existing law relating to manslaughter." Ch. 9269, § 1, Laws of Fla. (1923). Prior to the 1923 legislation, there was no specific Florida statute dealing with manslaughter arising from the operation of motor vehicles, and these cases were prosecuted under the general manslaughter statute, which has existed, essentially in its present form, since 1868. The first manslaughter statute was enacted in 1868. It defined the offense as the killing of "one human being."[5] When the homicide statute was revised in 1892, manslaughter was defined as the killing of "a human being."[6] This statutory language, which has remained unchanged since 1892,[7] indicates a clear legislative intent that the offense of manslaughter should be punished based on the number of victims rather than by reference to the particular act leading to the deaths.

Homicide statutes traditionally and uniformly impose punishment for each death caused by a defendant's criminal conduct. *See, e.g., Lovette v. State*, 636 So.2d 1304, 1305–06 (Fla.1994) (affirming three first-degree murder convictions where codefendants killed three people during a robbery); *Rosier v. State*, 343 So.2d 972, 973 (Fla. 1st DCA 1977) (permitting five counts of manslaughter by culpable negligence where five victims were killed in a single automobile crash). Homicides are punished based on the number of victims because the legislative purpose behind homicide statutes is to safeguard the lives of individuals. The Florida Legislature was guided by this purpose in enacting the DUI manslaughter statute; the unambiguous aim of the statute is to ensure the safety of individual citizens. Therefore, the gravamen of the offense of DUI manslaughter is not a traffic violation, but the killing of a human being. *See Cannon v. State*, 91 Fla. 214, 107 So. 360, 362 (1926) (stating that the felony of DUI manslaughter "lies not in driving of an automobile negligently while intoxicated ... but in the killing of a person").

Our understanding of the Legislature's intent is buttressed by our decision in *Melbourne* where we rejected a double jeopardy challenge to multiple convictions for DUI manslaughter arising out of a single DUI incident. *Melbourne*, 679 So.2d at 765. The defendant in Melbourne killed two people and injured a third while driving under the influence. *Id*. Based on these facts, we upheld the defendant's convictions on two counts of DUI manslaughter and one count of DUI with serious bodily injury. *Id*. We reasoned that a "DUI driver may sustain multiple convictions because the violation causes injury to each victim." *Id*.

Our decision today is controlled by the same understanding of legislative intent reflected in our decision in *Melbourne*. As stated above, we believe that the Legislature clearly intended to allow separate convictions of DUI

manslaughter for each death that occurs in a single DUI episode. It was this same understanding that enabled us to reject the double jeopardy challenge raised in *Melbourne*. *See Boler v. State*, 678 So.2d 319, 321 (Fla.1996) (explaining that the dispositive question in a double jeopardy analysis is the determination of legislative intent).

Our understanding of legislative intent regarding DUI manslaughter has not changed since Melbourne. The legislative intent is to allow separate convictions for each victim. This understanding comports with the uniform authority of Florida case law interpreting the DUI manslaughter statute. *See McHugh v. State*, 160 Fla. 823, 36 So.2d 786, 787 (1948) (stating that the great weight of authority supports the view that under the DUI manslaughter statute "[t]here is an offense for each unlawful homicide"); *State v. Wright*, 546 So.2d 798, 799 n. 2 (Fla. 1st DCA 1989) (stating that the prosecution of multiple counts of DUI manslaughter arising from a single DUI incident is commonplace and not open to serious question); *Pulaski v. State*, 540 So.2d 193, 194 (Fla. 2d DCA 1989) (stating that "one count of manslaughter is permissible for each death sustained during a drunk driving episode"); *State v. Naumowicz*, 535 So.2d 702, 702 (Fla. 1st DCA 1988) (permitting separate counts of DUI manslaughter based on separate deaths in a single DUI incident); *State v. Lowe*, 130 So.2d 288, 289 (Fla. 2d DCA 1961) (holding that "where two or more persons are killed by a single [DUI crash], there are as many separate and distinct offenses as there are persons killed by the unlawful act").

Applying a common-sense approach to the DUI manslaughter statute leads to one inexorable conclusion. Any reasonable consideration of the language of the statute, the history of its enactment, the uniform statutory treatment of manslaughter offenses, and the case law in existence makes it clear that the legislative intent is that each death caused in a DUI crash is to be charged and punished as a separate offense.

C. DUI Manslaughter and the A/Any Test

The a/any test does not compel a contrary determination of the Legislature's intended unit of prosecution for the offense of DUI manslaughter. Bautista's argument based on the a/any test succeeds only if we were to apply the test as a simple syntactical rule in isolation from the context in which the test arose. However, it would be improper to so isolate this distinction.[8] As discussed earlier, the a/any distinction was used in *Grappin* as one part of a common sense application of well-established rules of statutory interpretation, including reference to the overall statutory scheme and purpose as well as to related cases. Within this context, the a/any test is a valid linguistic tool that is helpful in establishing the Legislature's intended unit of prosecution. However, the a/any test is not an infallible or exclusive indicator of legislative intent.[9] Rather, absent clear legislative intent to the contrary, the a/any test

serves as a valuable but nonexclusive means to assist courts in determining the intended unit of prosecution.

We acknowledge that our decision in *Watts*, while reaching the correct result, might appear to apply the a/any test mechanistically. We applied the a/any test in that case because there was no clear evidence of legislative intent to permit multiple units of prosecution. However, *Grappin* and its progeny should not be interpreted to suggest that the intended unit of prosecution is automatically rendered ambiguous whenever a statute uses the word "any." In the DUI manslaughter statute, the intent of the Legislature is clear. And since our purpose in construing a statutory provision is to give effect to legislative intent, the unit of prosecution in DUI manslaughter cases must be the number of victims killed-not the number of DUI traffic violations. The a/any test should not be applied to create an ambiguity where none exists and then to reach a result contrary to clear legislative intent.

We therefore hold that the a/any test adopted in *Grappin* does not preclude multiple convictions of DUI manslaughter where multiple deaths occur in a single DUI crash.

We decline to address Bautista's collateral argument regarding the enhancement of his convictions for failure to render aid because this issue is outside the scope of the certified question and the Fourth District Court of Appeal did not rule on the issue. *See Major League Baseball v. Morsani*, 790 So.2d 1071, 1080 n. 26 (Fla.2001) (stating that this Court generally declines to review issues which are outside the scope of a certified question and which have not passed jurisdictional muster).

3. CONCLUSION

For the reasons stated above, we answer the certified question in the negative and approve the decision of the Fourth District Court of Appeal.

It is so ordered.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE, and CANTERO, JJ., concur.

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[1] We have jurisdiction under article 5, section 3(b)(4) of the Florida Constitution.

[2] Bautista also fled the scene of the accident without rendering aid to the passengers or providing information to the responding police officers. Both counts of DUI manslaughter were charged as first-degree felony DUI manslaughter under section 316.193(3)(c)(3)(b), Florida Statutes (2002).

[3] 944.47 Introduction, removal, or possession of certain articles unlawful; penalty.—

(1)(a) Except through regular channels as authorized by the officer in charge of the correctional institution, it is unlawful to introduce into or upon the grounds of any state correctional institution, or to take or attempt to take or send therefrom, any of the following articles which are hereby declared to be contraband for the purposes of this section, to wit:

1. Any written or recorded communication or any currency or coin given or transmitted, or intended to be given or transmitted, to any inmate of any state correctional institution.

2. Any article of food or clothing given or transmitted, or intended to be given or transmitted, to any inmate of any state correctional institution.
3. Any intoxicating beverage or beverage which causes or may cause an intoxicating effect.
4. Any narcotic, hypnotic, or excitative drug or any drug of whatever kind or nature including, but not limited to, a nasal inhalator of any variety, a sleeping pill, a barbiturate of any variety, and a controlled substance as defined in s. 893.02(3).
5. Any firearm or weapon of any kind or any explosive substance.
(b) It is unlawful to transmit or attempt to transmit to, or cause or attempt to cause to be transmitted to or received by, any inmate of any state correctional institution any article or thing declared by this subsection to be contraband, at any place which is outside the grounds of such institution, except through regular channels as authorized by the officer in charge of such correctional institution.
(c) It is unlawful for any inmate of any state correctional institution or any person while upon the grounds of any state correctional institution to be in actual or constructive possession of any article or thing declared by this section to be contraband, except as authorized by the officer in charge of such correctional institution.
(2) Whoever violates any provision of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[4] As stated earlier, the rule of lenity does not apply where legislative intent as to punishment is clear. Grappin, 450 So.2d at 482 (citing Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958)). The following discussion explains that we find the legislatively intended unit of prosecution for DUI manslaughter clear.

[5] In 1868, the Florida Legislature codified the common law of homicide. Ch. 1637, Laws of Fla. (1868). The statute set out a general definition of manslaughter: "The killing of one human being, by the act, procurement, or omission of another, in cases where such killing shall not be murder, according to the provisions of this chapter, is either justifiable or excusable homicide or manslaughter." Id. ch. 3, § 3.

[6] In 1892, the Legislature revised and consolidated the homicide statute. Degrees of manslaughter were eliminated, and certain common-law manslaughters (misdemeanor manslaughter, heat of passion killings, involuntary killing of a trespasser, and killing through negligence) were no longer specifically listed in the statute but became subsumed within the general definition of manslaughter. The general definition was amended to read: "The killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide or murder ... shall be deemed manslaughter...." § 2384, Fla.Rev.Stat. (1892).

[7] See § 782.07, Fla. Stat. (2002).

[8] In attempting to discern the intent behind a statutory term, courts should not mechanistically rely on a single tool but must use all available tools of interpretation. See United States v. Dickerson, 310 U.S. 554, 562, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940) (stating that "[t]he meaning to be ascribed to [a legislative act] can only be derived from a considered weighing of every relevant aid to construction").

[9] In fact, only if the criminal statute in question uses the article "a" is the legislative intent as to the intended unit of prosecution actually determined by the a/any test. This is because the use of the article "a" is unambiguous. If the adjective "any" is used, an ambiguity of legislative intent arises. Instead of using the traditional tools for determining legislative intent, the a/any test simply applies the rule of lenity to this ambiguity and precludes more than one unit of prosecution. This latter result avoids determining legislative intent rather than ascertaining that intent.

Notes

31. The first line of inquiry made by the *Bautista* court is into the legislative history. By analogy to contract interpretation, "legislative history" discussed at the beginning of Subsection A is nothing other than a form of the *parol/extrinsic evidence* – prior or contemporaneous statements that are extrinsic to the actual writing (addressed in the next Chapter). The very next inquiry is into the *plain meaning* of the term(s), which approximates the *plain meaning* test of contract interpretation. The following inquiry, in the quoted language of the second paragraph in its Subsection A on the

interpretation of “a/any,” looks suspiciously like the contracts-based rule of construction “expression of one term indicates the intent to exclude others.” That very same sentence sets out the ultimate goal – to determine the legislature’s “unmistakable” intent. Shortly following, the *unanimous* opinion inquired into the “overall statutory scheme,” which is nothing but a very close cousin of “course of dealing.” Further, in the very next sentence, the Court reviewed other cases, which uncannily approximates “usage of trade.” All of this is closely followed by a “common-sense approach,” which would appear to be the same thing as the rule of construction calling for an interpretation of a term in harmony with the rest of the agreement so as to come up with an interpretation that does not invalidate or nullify any other provision. Further, though it is not stated with particular clarity, there is a sense that some of the tests or inquiries are *within the four corners* of the statute. Resort to federal cases on interpretation is a unique, extrinsic twist. Though it would appear that there is no true judicial consensus on a hierarchical order of tests to be used for statutory construction, this is best left to other law courses. Developing some sense of mutual hierarchy spanning the gap between contractual and statutory interpretation would, however, assist in memory that would for example serve a person well on a bar exam.

32. It would be much easier if the facts were presented in their most essential essence. For example: "The applicable law criminalized "any" death of a human being caused by a DUI - the perpetrator argued that "any death" is singular or plural and thus a single accident, no matter how many deaths that it causes, is one violation - the State argued that "any" is subject to the "a/any" test used in other cases, which focuses on legislative intent, i.e., whether the focus of the language is the number of accidents on the one hand, or the number of deaths on the other." The ability to quickly identify the salient facts is a skill that takes time and practice to develop, and is the reason why the cases herein often do not redact the facts. Relying on others' synopses may lead to "headnote lawyering," i.e., seeing a short synopsis that seems to fit and using it, when a careful review of the facts would indicate that the holding does not apply to the case at hand for an important factual difference. Legal terms making this point include *inapposite* and *distinguishable*.

33. Did you realize, before this Note, that the entire Chapter 15 deals with the ‘holistic’ and U.C.C.-version Test 4 of interpretation? Otther than facets of the *Bautista* case, which intends to create a parallel that is more generalized to the entire gamut of interpretation issues?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 15

47. The difference between *parol evidence* and *extrinsic evidence* (if any)
48. The hierarchy between course of performance, course of dealing, and usage of trade
49. The workings of statutory or legislative interpretation, and its similarity to contractual interpretation

SUGGESTED EXERCISE(S)

(38) From Chapter 5, remind yourself how to choose between using common-law and sale-of-goods law. What if there is overlap? Something not covered?

(39) Check the case law of other jurisdictions by searching the terms *parol evidence* and *extrinsic evidence*. Do the courts use both as equivalents? Do they use one for integration questions and the other for interpretation questions? Should they?

CHAPTER 16: INTEGRATION AND THE PAROL EVIDENCE RULE

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The question of integration is one of interpretation: is a writing the complete contract, or are there prior emails, discussions, brochures, samples, etc., that were intended to be included in the final bargain that may not have found their way into the final agreement? Many casebooks lead off with the *integration* question before addressing *interpretation*, which makes sense

because it is logical to determine what is, and what is not, part of an agreement before checking for potentially ambiguous terms. However, the question of *integration* is one of intent, which is also one of potential ambiguity. Chapter 17 introduces a third major *interpretation* question. To recap, the approach has been to cover the issues in a particular order. First, Chapter 14 addresses the main category of *interpretation*, particularly of ambiguous terms within a contract (of which the next two are subsets). Second, this Chapter concerns the issue of *integration*, which is whether a contract is complete or may be supplemented by evidence of prior or contemporaneous information. Third, Chapter 17 covers a unique and highly policy-related issue whether a term that might be interpreted as a *condition* could instead be ambiguous enough to interpret as a *covenant*. The first can halt things in their tracks; the second fosters further performance with some form of compensation for damages. The policy reason is to maintain a contractual relationship in order to avoid forfeiture on the part of the breaching party. (Does this seem like a Test #3 rule of construction?) Whereas failure of a *condition* prevents a duty from arising or cuts it off (which leads to forfeiture by the other party), the breach of a *covenant* may entitle the non-breacher to damages, but the rest of the contract would need to be performed.

With the addition of two key concepts, which fit best in the initial question of the parties' intent, the five-part test introduced in Chapter 14 works fairly well with just a smidgeon of alteration. As in the case of *interpretation*, the courts determining integration issues appear not to have addressed the rules or the tests as clearly as are suggested in this casebook. If the proposed hierarchy is not exactly a perfect fit in this particular area, the law has enough opaqueness to permit it. Having a more definite hilt to grasp should make for better argument, in any event.

The subject of integration is relatively simple. The concept of integration is the idea that all of the details from discussions, emails, samples, brochures, etc., are, or are not, intended to have been fully included into the final agreement. A lot of negotiation goes on, but at some point the parties must agree on the main terms to move out of the negotiating phase and into the formation and post-formation (i.e., *performance*) phases. Stated another way, and using a word that is interchangeable with "integration," the question is whether the parties intended for all negotiations to be completely *merged* into the final agreement such that anything not in that final agreement was in fact intended to be excluded. *Integration* or *merger* may be complete, meaning that nothing prior to or contemporaneous with the final manifestation of the agreement may be considered as part of the agreement. It is also possible that the parties, often if they have a long-standing business relationship, finalize an agreement that is not fully complete, and that the intent is to supplement it with prior agreements, discussions, emails, brochures, etc. Worthy of special caution is the fact that for this legal operation, and for the one that follows,

nothing *contradictory* is allowed. This legal exercise is one of supplementation, not one of modification. There is also the possibility of a partial integration, i.e., for the *integrated* parts there can be no supplementation, but if there are some parts of an agreement that are not integrated, supplementation (but again, not contradiction) is allowed. What becomes confusing is the myriad number of facts that could go into a decision on integration. Is there an *integration* or *merger* clause? Does the agreement look so complete even without such clause that it unquestionably manifests its exclusivity? If the answer is not fully clear, which test would a court use?

CMM Approach: use of the following test, which is only slightly amended from the test for *interpretation*, should provide some welcomed framework to the study the sometimes complicated area of contract *integration*. With just a minimum of modification, this is the same as was set out for *interpretation* in Chapter 14. There are two primary, further considerations for the *integration* question: *collateral agreements* and *merger clauses* (the latter of which is commonly considered as *evidence* of an intent for full integration – however its existence in a contract creates a rebuttable presumption and therefore it can be overcome with enough evidence to rebut.

	Goal[35] is to determine the intent of the parties – two additional factors: 1. Is the thing typical of a *collateral agreement*?[36] 2. Is there an *integration* or *merger clause*?[37]	Consider these two factors for their impact on the following tests

The Tests:

	RULE	**LEVEL**
1	*Plain meaning* of word or phrase (supplemented by use of a dictionary) (*this is where the two questions above should be conclusive or rejected*)	Intrinsic to the word or phrase
2	Interpreting the meaning from within the *four corners*	Intrinsic to

35

36

37

	of the document *(inquiry into the two extra "goals" questions might spill to this test)*	the document
3	*Other rules of construction* (wise rules of contract law used as canons)	More 'extrinsic'
4	*Holistic* or *mélange* approach (Rest. (Second) and U.C.C. Article 2)	Very 'extrinsic'
(5	When all else fails, let the jury decide	Very 'extrinsic')

Note

Technically, *parol evidence* is a subset of the larger category of *extrinsic evidence*. The parol evidence rule is associated with the question of integration, i.e., whether evidence of prior or contemporaneous agreements (by discussion, by email, by brochure, by sample, etc.) is permitted to supplement but not to contradict a final agreement. Extrinsic evidence is evidence outside of the agreement in issue, the question being whether it may be used to supplement or to explain the agreement. Thus, evidence used to clarify some ambiguity *other than relating to the integration issue*, such as a question about performance (or delivery) date, or even the color of an item (widgets) or a service (painting of walls), would be *extrinsic evidence*. Whether such evidence may be *considered* is not to interpret, but to *supplement*, the agreement is the difference.

CMM Approach: it may be helpful to use the term *parol evidence* for the integration question, and the term *extrinsic evidence* for all other applications in cases of alleged ambiguity. In the case of confusion, use of *extrinsic evidence* in all cases would be appropriate. This may be a distinction without a difference, but there is historical precedent for distinguishing these two terms. Remember, if the question is, "What does a contract term mean?" it is a question of interpretation. If it is a question of what is or is not part of a contract, it is a question of integration.

1. Plain Meaning (Unambiguous)

Where the language is clear, then courts do not engage in ambiguity analysis. The case that follows bases its (*unanimous*, on the integration issue) decision on the fact that there was no lack of clarity. Worthy of note, however, is that this was supplemented by consideration of the two, distinct *integration* clauses – which as noted above are useful but not necessarily dispositive. In the below, they are used to solidify a holding based on the first, or *plain meaning*, test.

A. Plain Meaning Including an Integration (or Merger) Clause

TITUSVILLE ASSOCIATES, LTD. v. BARNETT BANKS TRUST CO.

Supreme Court of Florida, 1991

591 So. 2d 609

PER CURIAM.

We have for review *Barnett Banks Trust Co., N.A. v. Titusville Associates, Ltd.*, 560 So.2d 1337 (Fla. 1st DCA 1990), based on express and direct conflict with Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984). We have jurisdiction. Art. 5, § 3(b)(3), Fla. Const.

In 1985, Brevard County issued industrial revenue development bonds to finance an adult congregate living facility to be built by Titusville Associates. Under their financing agreement, the county loaned the funds to Titusville Associates, and the latter signed a promissory note secured in part by a nonrecourse mortgage in the facility and an assignment of rents and leases. The county also entered into a trust indenture agreement whereby it pledged to Barnett Banks its right to collect and receive funds under the financing agreement, for the benefit of the bondholders.

The financing agreement required Titusville Associates to deliver to Barnett Banks an operating deficit letter of credit for $511,000, which originally was set to expire on July 1, 1988, but was extended to July 3, 1989. In addition, Titusville Associates' only general partner, Michael J. Levitt, signed a personal guarantee that in pertinent part required him to cover operating deficits not to exceed $750,000. The letter of credit and guarantee are embodied in separate documents, and each contains its own integration clause specifying that the document embodies the entire agreement between the parties and cannot otherwise be modified.

The guarantee did not refer to the letter of credit and did not specify that Levitt's personal $750,000 exposure would be reduced by any amount Barnett Banks might obtain under the $511,000 letter of credit issued on behalf of the partnership. The personal guarantee stated in pertinent part only that the guarantee “shall not require Guarantor (or Borrower) to advance more than $750,000 under this Guarantee, exclusive of any amounts that may be available for operating deficits from Bond Proceeds.”

In 1987, Titusville Associates defaulted on its loan, and Barnett Banks exercised its option to accelerate the payments due. In early 1988, Barnett Banks then filed a complaint for declaratory judgment that attempted to

collect Levitt's personal $750,000 guarantee and simultaneously draw on the partnership's $511,000 letter of credit. Barnett Banks argued that the guarantee and letter of credit were separate sources of security for the bondholders, while Titusville Associates and Levitt contended that the terms of the guarantee limited Barnett to a total recovery of no more than $750,000 including the amount from the letter of credit.

* * *

On the second issue, we agree with the court below that the terms of the letter of credit and personal guarantee were unambiguous and not subject to modification by parol evidence. This conclusion is strongly supported by the fact that both instruments contained their own integration clauses, and that the personal guarantee nowhere referred to the letter of credit or a possible offset based on the $511,000 amount of the partnership's letter of credit. Had the parties intended the $750,000 limitation to include the amount from the letter of credit, they should have done so in express language, especially in light of the integration clauses contained in these documents. Each of the relevant documents clearly can stand alone and be fully enforced without affecting the meaning of the other, nor is there any ambiguity in the way they are drafted. Accordingly, we find no error in the determination of the merits of this case.

* * *

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion, in which BARKETT, J., concurs.

KOGAN, Justice, concurring in part, dissenting in part (on other grounds not included in the excerpt)

B. Plain Meaning Involving a Collateral Agreement

The notion that some sets of agreements were intended to be separate is a form of partial integration. Just as was the clear from the *Titusville Associates, Ltd*. case, contractual dealings may contain more than one phase, or there may be reason for there to be two separate agreements. An example of the latter in a transactional setting could be an agreement with major shareholders to purchase a controlling share of a company, but to execute separate employment agreements with key employees for continued employment *after* the purchase concludes. The retained, key employees may

not want all of the others to know the contents of their new compensation packages. Thus, this is an ideal situation to use a collateral agreement. There is no good answer to the question of which test would resolve the issue of the existence of a collateral agreement. It is argued that this question would probably be answered by the first (*plain meaning*) or second (*four corners*) tests, although in tricky cases there is no reason why this question might not require use of the more extrinsic tests. There are no straightforward Florida cases identified on this point, although the Eleventh Federal Circuit Court of Appeals, in which Florida is located, has made pronouncement on the matter (see Note below). Though the court ruled that there was no collateral agreement, its analysis includes court discernment of intent. The opinion does not make fully clear which test was used but arguably the test used was the first, or *plain meaning* test. Like the Florida courts, the federal courts may not adhere to a clear hierarchy or identification of the test(s) used to determine the integration issue. The reason may be because courts are constrained to answer the questions as presented by counsel (or by the parties) without the ability to better organize. While the goal is always clear (i.e., reaching the intent of the parties), eventually use of the tests should be harmonized based on the clear hierarchy of least to most extrinsic evaluation. This altered paradigm may cause some consternation.

Note

The Florida courts have not recently addressed the collateral agreement issue, and also appear to call it an issue of "extrinsic" rather than "collateral" agreement. Nevertheless, Florida case law too recognizes that some agreements are intended to be related, even though an agreement under consideration makes absolutely no mention of this relationship. *See, e.g.*, *Little River Bank and Trust Co. v North American Mortgage Corp.*, 186 So. 2d 203 (Fla. 2d DCA 1966), *rehearing den.* 192 So. 2d 487 (Fla. 1966) (parties verbally agreeing that they would share lost interest on certain construction loans when one transferred the collection rights was an extrinsic agreement that could be introduced into evidence to explain the parties' intent despite the parol evidence rule). In *Matthews v. Drew Chemical Corp.*, 475 F.2d 146 (5th Cir. 1973),[38] a unanimous Fifth Circuit Court of Appeals stated:

> We begin our analysis by recognizing that even though a writing declares on its face that it is "integrated," circumstances may well exist that justify receiving parol evidence to determine what the parties intended the document to be or mean. Regarding partial integrations, for example, the law is clear:
>
> "The parol evidence rule does not preclude the introduction of evidence showing a prior or contemporaneous agreement if the

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writing, or writings, constitute only a partial integration of the agreement between the parties. That is, if the writings are but a partial integration of the agreement, the rest of the agreement, or collateral agreements, may be shown through parol.

"It follows, therefore, that where the issue is fairly raised by the evidence, the court must preliminarily and initially determine whether the writings in question were intended to, and do, constitute a complete integration of the agreement between the parties. For the purpose of making that preliminary determination, the parol evidence rule is inapplicable. . . ."

Walley v. Bay Petroleum Corp., 5 Cir. 1963, 312 F.2d 540, 543-544. *See also South Florida Lumber Mills v. Breuchard*, 5 Cir. 1931, 51 F.2d 490.(Footnote omitted)

As a general proposition, then, there can be no error in a trial judge's allowing parol testimony into evidence in the first instance. *See, e. g., Ivy H. Smith Co. v. Moretrench Corp.*, 5 Cir. 1958, 253 F.2d 688 (writing itself stated that it "contains all of the agreement"). Thus, we cannot say that it was improper for the judge below to have heard parol evidence regarding the intent of the parties as to whether this document was to be a total integration of Matthews' employment contract. But the matter cannot be put to rest by making that determination. The real issue in these cases is whether the parol evidence could permissibly be used during the trial in the manner in which it was employed. Here, Matthews was allowed to convince the jury that, in light of their prior oral agreement, when the parties wrote "Employment may be terminated at any time by either party to this Agreement giving notice to the other party," they were really agreeing that "Employment may be terminated at any time by either party to this agreement giving notice to the other party, but employer shall have the power to exercise this right to terminate only if he can show good cause for terminating employee's employment." We find that it was error to allow the parol evidence to be put to this use.

* * *

C. Plain Meaning Rule Without a Merger Clause or Collateral Agreement

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HARKLESS v. LAUBHAN

District Court of Appeal of Florida, Second District, 2016

BADALAMENTI, Judge.

David L. Harkless appeals the trial court's final summary judgment entered in favor of David and Susan Laubhan. The crux of this dispute is whether Mr. Harkless reserved the right to receive rent from a parcel of land that he used to own and that the Laubhans eventually came to own.
We reverse the grant of summary judgment. Mr. Harkless reserved his right to receive rent in a sales contract with an intermediate purchaser. That reservation did not merge into any subsequent deed. Nevertheless, there remains a genuine issue of material fact as to whether the Laubhans were bona fide purchasers for value and without notice, rendering summary judgment inappropriate. Our reversal extends to any relief the trial court provided to the Laubhans on their counterclaim.

1. STATEMENT OF FACTS & PROCEDURAL POSTURE

Mr. Harkless owned land in DeSoto County. In 2008, he entered into a land lease agreement (the Lease) with Verizon Wireless. Under the Lease, Mr. Harkless leased a 100– by 100–foot parcel of his land (the Parcel) to Verizon, along with an accompanying easement for Verizon to build a cell tower. In return, Verizon agreed to pay Mr. Harkless $13,800 a year in rent. Verizon did not commence construction of the tower until May 2012.

In 2011, Mr. Harkless sold ten acres of his land to Reed and Beth Lolly, who planned to operate a blueberry farm. Those ten acres contained the Parcel. Paragraph 18 of the sales contract between Mr. Harkless and the Lollys (the Harkless–Lolly contract) contains a handwritten addendum entitled "Additional Terms." The addendum states, "The Easement for the said Verizon Cell Tower location is 115 ft x 115 ft in which the seller David L. Harkless shall continue and remain owner of said easement and Verizon cell tower lease." [Foonote omitted] However, the subsequent warranty deed from Mr. Harkless to the Lollys (April 2011 Deed) did not contain a similar provision specifically memorializing Mr. Harkless's right to receive rent.

Three months later, after deciding that market conditions for blueberries were unfavorable, the Lollys sold the ten acres to the Laubhans—retirees who owned a small ranch on adjoining land. The sales contract between the Lollys and the Laubhans (the Lolly–Laubhan contract) made no express mention of Mr. Harkless's remaining interest in the Parcel. Unlike paragraph 18 of the Harkless–Lolly contract, paragraph 18 of the Lolly–Laubhan contract provides, "Buyer is aware of Verizon tower lease and has received a copy of the survey and lease." The warranty deed from the Lollys to the Laubhans (the July 2011 Deed) contained no language addressing Mr. Harkless's right to receive rent under the Lease.

Both the April 2011 Deed and the July 2011 Deed stated that they were "subject to a (Verizon Wireless) Easement as described in Instrument # 200814009062, DeSoto County, Florida." That instrument, entitled "Amended Memorandum of Lease Agreement," is essentially an abridged version of the Lease. The Amended Memorandum is silent as to Mr. Harkless retaining his right to receive rent.

Shortly before Verizon began construction of the tower in May 2012, Mr. Harkless gave Communications Capital Group, LLC, the option to purchase his interest in the Lease for $175,000. Communications Capital thereafter sent the Laubhans a letter asking them to sign and notarize documents which purported to memorialize Mr. Harkless's continued right to receive rent under the Lease. The Laubhans responded that they owned the Parcel free and clear of Mr. Harkless's right to receive rent. As a result of this claim, Communications Capital did not exercise its option.
Mr. Harkless then filed a two-count complaint against the Laubhans. He sought a declaratory judgment that he had the right to receive rent under the Lease. He also sought reformation of both the April 2011 Deed and July 2011 Deed to reflect this right. The Laubhans moved for summary judgment. They argued that the April 2011 Deed and the July 2011 Deed failed to expressly reserve Mr. Harkless's right to receive rent. Accordingly, the Laubhans maintained that the right to receive rent was presumptively conveyed from Mr. Harkless to the Lollys and ultimately from the Lollys to the Laubhans.

* * *

A. Reservation of Mr. Harkless's Right to Receive Rent

We interpret contracts in accordance with their plain and ordinary meaning when the contractual language is clear and unambiguous. *See Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So.3d 638, 640 (Fla. 2d DCA 2016). Similarly, "[w]hen the language of a deed is clear and certain in meaning and the grantor's intention is reflected by the language employed, there is no room for judicial construction of the language nor interpretation of the words used." *Rogers v. United States*, 184 So.3d 1087, 1095 (Fla. 2015) (*quoting Saltzman v. Ahern*, 306 So.2d 537, 539 (Fla. 1st DCA 1975)).

Neither the April 2011 Deed nor the July 2011 Deed contains language specifically reserving Mr. Harkless's right to receive rent pursuant to the Lease. Yet, in their Statement of Undisputed Facts, the Laubhans concede that Mr. Harkless and the Lollys "specifically agreed that Harkless was to receive the Verizon lease payments." We likewise agree that the "Additional Terms" section of the Harkless–Lolly contract reserved Mr. Harkless's right to receive rent. *See Gray v. Callahan*, 143 Fla. 673, 197 So. 396, 398–99 (1940) ("The transferor of [a] reversion may ... in the transfer expressly reserve the rent for

part [or] all of the term granted by the lease ....” (*quoting* 16 Ruling Case Law, Landlord and Tenant § 128 (William M. McKinney & Burdett A. Rich eds., 1917))); 1 Herbert Thorndike Tiffany, The Law of Real Property and Other Interests in Land § 53(a) (1920) (explaining that, when a lessor uses language referring to the “transfer of a lease,” they are ordinarily referring to transfer of the right to receive rent, as opposed to the transfer of some reversionary interest).

B. Extrinsic Evidence, Merger by Deed, and the Intent of the Parties

Because Mr. Harkless reserved his right to receive rent in the Harkless–Lolly contract, we must reckon with the Laubhans' arguments concerning ambiguity and merger by deed. At the hearing on their summary judgment motion, the Laubhans asserted that even if Mr. Harkless reserved his right to receive rent in the Harkless–Lolly contract, that right merged into the April 2011 Deed without specific reservation and was then conveyed to the Laubhans in the July 2011 Deed. Accordingly, the Laubhans believe that the Harkless–Lolly contract is inadmissible parol evidence and cannot be used to construe the otherwise unambiguous language of conveyance in the April 2011 Deed and July 2011 Deed.

It is axiomatic that preliminary agreements concerning the sale of property merge into the deed executed pursuant to the sale. *Morton v. Attorneys' Title Ins. Fund, Inc.*, 32 So.3d 68, 72 n.3 (Fla. 2d DCA 2009) (*quoting Engle Homes, Inc. v. Jones*, 870 So.2d 908, 910 (Fla. 4th DCA 2004)). This axiom encompasses real estate sales contracts. *See Stephan v. Brown*, 233 So.2d 140, 141 (Fla. 2d DCA 1970).

The doctrine of merger by deed, however, is an extension of the general principle of integration in written contracts. Whether discussing merger into a deed or integration of a prior agreement into a subsequent contract, our guiding principle is the intent of the parties. *See Jenkins v. Eckerd Corp.*, 913 So.2d 43, 53 (Fla. 1st DCA 2005) (“The concept of integration is based on a presumption that the parties to a written contract intended that writing ‘to be the sole expositor of their agreement.’ ” (*quoting Everglade Lumber Co. v. Nettleton Lumber Co.*, 111 Fla. 333, 149 So. 736, 738 (1933)). If it is undisputed that none of the parties to a real estate transaction intended for certain provisions of their real estate sales contract to merge into a subsequent deed, then no merger takes place as to those provisions. *See Milu, Inc. v. Duke*, 204 So.2d 31, 33 (Fla. 3d DCA 1967) (“The rule that acceptance of a deed tendered in performance of a contract to convey land merges or extinguishes the covenants and stipulations contained in the contract does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed ....”).

Although the April 2011 Deed does not expressly reserve Mr. Harkless's right to receive rent, all of the parties to that deed—Mr. Harkless and the Lollys—patently testified in their depositions that they intended for Mr. Harkless to retain the right to receive rent under the Lease and that they understood paragraph 18 of the Harkless–Lolly sales contract to effectuate this retention. Moreover, the Laubhans stipulated to the same construction of paragraph 18 in their Statement of Undisputed Facts. Because all parties to the Harkless–Lolly sales contract agree that paragraph 18 was intended to reserve Mr. Harkless's right to receive rent, that right did not merge into the April 2011 Deed as a matter of law. And because Mr. Harkless and the Lollys do not dispute that paragraph 18 never merged into the April 2011 Deed, it is irrelevant whether or not the April 2011 Deed is unambiguous on its face. See Milu, Inc., 204 So.2d at 33; *see also Providence Square Ass'n v. Biancardi,* 507 So.2d 1366, 1371 (Fla. 1987) ("In a reformation action in equity ... parol evidence is admissible for the purpose of demonstrating that the true intent of the parties was something other than that expressed in the written instrument.").

* * *

We reverse the trial court's grant of summary judgment to the Laubhans and remand for proceedings consistent with this opinion. Mr. Harkless reserved his right to receive rent in the Harkless–Lolly contract, which did not merge into any subsequent deed. Genuine issues of material fact remain as to whether the Laubhans were bona fide purchasers for value and without notice. Our reversal also extends to any relief the trial court afforded to the Laubhans on their counterclaim. We express no opinion on the merits of reformation as to one or both of the Deeds in this case.

Reversed; remanded for further proceedings.

LaROSE, J., Concurs.

BLACK, J., Concurs in result only with opinion.

BLACK, Judge, concurring with opinion. (*cont.*-)

In my opinion, the majority makes findings of fact and reaches conclusions of law that exceed the scope of our review of a final summary judgment inappropriately granted. 1 would reverse and remand for further proceedings, concluding only that the intent of the parties was an issue of material fact in dispute which precluded summary judgment. *See Fiore v. Hilliker*, 170 So.3d 147, 151 (Fla. 2d DCA 2015) (reversing summary judgment where the intent of the parties was a disputed material fact which was to be considered by the trier of fact below); Hervey v. Alfonso, 650 So.2d 644, 646 (Fla. 2d DCA 1995) ("[A] motion for summary judgment is not a substitute for a trial on the merits.

Hence, a trial court is precluded from resolving disputed issues of fact when considering such a motion. Thus, when a defendant moves for summary judgment, neither the trial court nor this court determines whether the plaintiff can prove the cause of action alleged. The function of the court is solely to determine whether the appropriate record presented in support of summary judgment conclusively shows that the plaintiff cannot prove the claim alleged as a matter of law." (citation omitted)).

The trial court granted summary judgment in favor of the Laubhans but made no express findings of fact or conclusions of law. Upon review of the hearing transcript and the arguments made, and in the absence of findings by the trial court, it appears that the only basis upon which the trial court could grant summary judgment in favor of the Laubhans was the determination that the deeds and Lease Agreement, the subjects of Mr. Harkless's complaint, unambiguously did not reserve Mr. Harkless's right to rent under the Lease—the argument raised by the Laubhans at the hearing. In opposition to the Laubhans' motion and arguments, Mr. Harkless contended that the "subject to" language in the deeds rendered them ambiguous and that in order to resolve that ambiguity, the trial court was required to consider the language of the Harkless–Lolly contract and the intent of the parties—extrinsic evidence.

"[A] trial court may not weigh the evidence or judge the credibility of witnesses in arriving at summary judgment; instead, the moving party must conclusively show the absence of any genuine issues of material fact." *Plantation Key Office Park, LLLP v. Pass Intern., Inc.*, 110 So.3d 505, 508 (Fla. 4th DCA 2013) (*citing Craven v. TRG–Boynton Beach, Ltd.*, 925 So.2d 476, 480–81 (Fla. 4th DCA 2006)). "A summary judgment motion will be defeated if the evidence by affidavit or otherwise demonstrates the existence of a material factual issue." *Harvey Bldg., Inc. v. Haley*, 175 So.2d 780, 782 (Fla. 1965).

Florida law holds that "[t]he words 'subject to' in a deed or contract generally create an ambiguous deed or contract." *Hastie v. Ekholm*, 199 So.3d 461, 464 (Fla. 4th DCA 2016) (*citing Procacci v. Zacco*, 324 So.2d 180, 182 (Fla. 4th DCA 1975)); *see also Cook v. Tradewinds W. Condo., Inc.*, 636 So.2d 591, 592 (Fla. 3d DCA 1994). As applied in this case, if the trial court were inclined to accept the Laubhans' argument that no material issues of fact were in dispute based on the language of the deed, Mr. Harkless sufficiently "demonstrate[d] the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented" through the deposition testimony and evidence on record. *See Harvey Bldg.*, 175 So.2d at 783. As a result, summary judgment was inappropriate. *See Mac–Gray Servs., Inc. v. Savannah Assocs. of Sarasota, LLC*, 915 So.2d 657, 659–60 (Fla. 2d DCA 2005) ("[W]hen an agreement contains a latent ambiguity ... the issue of the correct interpretation of the agreement is an issue of fact which precludes summary

judgment." (*quoting Griffin v. Fed. Deposit Ins. Corp.*, 532 So.2d 1358, 1360 (Fla. 2d DCA 1988)).

Because on the record before us there is no way to conclusively determine on what basis the trial court granted summary judgment, 1 would apply the general rule that where a contract or writing is ambiguous, "the parties' intent becomes a question of fact for the fact-finder, precluding summary judgment," rather than the exception that "a contract may be interpreted as a matter of law when the ambiguity can be resolved by undisputed parol evidence of the parties' intent*." Life Care Ponte Vedra, Inc. v. H.K. Wu*, 162 So.3d 188, 191–92 (Fla. 5th DCA 2015); *see also Centennial Mortg., Inc. v. SG/SC, Ltd.*, 772 So.2d 564, 566 (Fla. 1st DCA 2000) ("Contract interpretation is for the court as a matter of law, rather than the trier of fact, only when the agreement is totally unambiguous, or when any ambiguity may be resolved by applying the rules of construction to situations in which the parol evidence of the parties' intentions is undisputed or non-existent." (*quoting Land O'Sun Realty Ltd. v. REWJB Gas Inv.*, 685 So.2d 870, 872 n.3 (Fla. 3d DCA 1996), *review dismissed sub nom. Lennar Fla. Partners, 1 v. REWJB Gas Inv.,* 710 So.2d 978 (Fla. 1998))).

Note

The concept of an executory contract was introduced in Chapter 4. Contracts for the purchase or sale of real estate are excellent examples because they begin with a contract that calls for quite a few further activities to be accomplished. Examples include home inspections, survey of the land, the securing of financing, etc. It is only after all of these thing are accomplished, in the *executory phase*, that the ultimate closure is reached, i.e., that thing that evidences transfer of title from seller to buyer: the deed. Using the same logic as is being considered in this Chapter, the general rule is that all contractual matters "merge into the deed," i.e., if contractual things do not show up in the deed, they were quite possibility (but no always) intended to be left out. Clearly this follows the same logic as the parol evidence rule. The way for a party to ensure the continued existence of an important contract right expressed in the contractual phase is to ensure that it is included in the deed or to establish it as a *collateral agreement* which was intended to survive the *merger by deed* operation. *See, e.g., American Nat. Self Storage, Inc. Lopez-Aguiar*, 521 So. 2d 303, 305-06 (Fla. Dist. Ct. App. 3d 1988); *but c.f. Goodall v. Whispering Woods Center, L.L.C.,* 990 So. 2d 695 (Fla. Dist. Ct. App. 4th 2008) (stating that in equitable proceedings requesting reformation, even the existence of a merger clause did not exclude evidence of agreement not included in a deed). The collateral agreement exception to the merger doctrine in the case of real estate sales does not, however, apply to easements and other encumbrances where the deed warrants that title is unencumbered. *See American Nat. Self Storage*, 521 So. 2d at 306. The relation of this

concept to real property law should be obvious, as should soon be the Florida Bar Examiners' penchant for asking essay questions that involve more than one area of law in the same question.

2. Four Corners Rule

The *integration* question is still one of interpretation. The Florida courts have addressed this issue at least once, although the court did not mention the *four corners* rule. Rather, the court insisted that inquiry on the completeness of an agreement (i.e., the *integration* question) required "a look at the balance of the entire agreement to see what the intent of the parties were." This is merely a restatement of the *four corners* rule. This is not to say that there are no cases finding for full integration that are decided in the absence of a merger clause based on the overall comprehensiveness of an agreement. Stated another way, in the absence of an integration or merger clause, a finding of full integration is still appropriate where review of the entire agreement indicates, on balance, that it is full and complete, and without any latent ambiguities. (In fact, to be completely honest, the test used in the case that follows looks like an amalgamation of the *plain meaning* (no ambiguities) and the *four corners* (full and complete in the balance) tests). The authors advocate rulings on a single basis rather than a balancing of multiple tests.

J.C. PENNEY CO., INC. v. KOFF

District Court of Appeal of Florida, Fourth District, 1977

345 So. 2d 732

CARLTON, Associate Judge.

Appellant, J. C. Penney, Inc., a Delaware corporation authorized to do business in the State of Florida, appeals a final judgment entered by the trial court denying the appellant's claim for specific performance and for damages and granting appellee's counter-claim for rescision of a sale and purchase agreement and awarding damages pursuant thereto.

On December 17, 1973, appellant, J. C. Penney Company, Inc., entered into a sale and purchase agreement with appellee, Richard Koff, for the sale of certain land totalling 9.615 acres in the City of Lauderdale Lakes, Broward County, Florida. Nogotiations had been conducted over a 25 month period prior to this. At the time the sale and purchase agreement was entered into, the zoning applicable to the subject property was R-4A which allowed 28

condominium units per acre. On March 26, 1974, prior to closing, the City of Lauderdale Lakes revised its description of R-4A zoning and provided that such development could not have more than 12 condominium units per acre. Thus making the venture less profitable to appellee. The closing was scheduled to take place April 23, 1974. Shortly before the closing appellee Koff delivered notice of rescision relying on the fact that the zoning had been changed.

Appellant Penney filed a complaint for specific performance and damages on the sale and purchase agreement between it and the appellee Koff. Appellee filed his answer denying appellant's right to specific performance and for damages and filed a counter-claim for the return of funds it deposited under the sale and purchase agreement as well as for the reimbursement of certain other funds spent under a collateral agreement between appellee and the City of Oakland Park, Florida. At the termination of the non-jury trial, the court entered a final judgment denying appellant Penney's request for specific performance, denying appellant's claim for damages and finding for appellee Koff on the counterclaim for the rescision of the sale and purchase agreement. The trial court further awarded appellee the sum of $65,000 in damages. This sum represented $10,000 as a deposit on the sale and purchase agreement and $55,000 for the sum appellee paid on the collateral agreement with the City of Oakland Park, Florida.

Appellee's primary case in the trial court consisted of attempting to show an ambiguity in the sale and purchase agreement and utilizing various parol testimony and prior correspondence in an attempt to support his position for denial for specific performance. The trial court over objections of appellant held that certain provisions in the sale and purchase agreement were ambiguous and allowed into evidence parol testimony and certain prior correspondence between the parties.

The substance of the parol evidence was to establish that appellee because of the change of density requirements between the execution of the contract and the scheduled closing would have a less profitable business venture and that appellee did not intend to be bound by the sale and purchase agreement if there was a change in the density.

Paragraph 1A, 1C and 6 of the sale and purchase agreement must be examined for ambiguities. They are as follows:

> ‘1. AGREEMENT TO SELL AND PURCHASE.
> Seller shall sell and Purchaser shall purchase good and marketable fee simple title to the Premises described on Exhibit ‘A’ subject to the following:

> ‘A. Applicable building laws, *zoning ordinances*, laws and other regulations of any governmental body, subdivision, or agency having jurisdiction existing *at the date of closing of title*, provided the same do not prohibit the construction of residential type units As *permitted* under zoning ordinance category R-4A of the zoning ordinance of the City of Lauderdale Lakes, Florida including an apartment complex and recreational amenities including tennis courts, swimming pools and a health club.’ . . . (Emphasis added)
>
> ‘C. All covenants, agreements, restrictions and easements of records; provided the same do not prohibit the construction of residential type units as *provided* under zoning ordinance category R-4A of the zoning ordinance of Lauderdale Lakes, Florida including an apartment complex and recreational amenities including tennis courts, swimming pools and a health club.’ (Emphasis added)
>
> 6. NO REPRESENTATIONS BY SELLER
> ‘Seller makes and has made no representation, statement, warranty or guarantee as to the conditions, fitness or value of the Premises. The execution of this Agreement has not been procured by any representation, statement, warranty or guarantee not herein contained and Purchaser agrees to accept the Premises ‘*as is' as of the date hereof.*’ (Emphasis added)

Appellee contends that the phrases ‘as permitted’ under Paragraph 1A, ‘as provided’ under Paragraph 1C and ‘as is as of the date hereof’ under Paragraph 6 were ambiguous and therefore, parol evidence should be received by the court to determine what was meant by these phrases.

In reviewing the contract in an attempt to determine its true meaning, the court must review the entire contract without fragmenting any segment or portion. *Royal American Realty, Inc., v. Bank of Palm Beach and Trust Company,* Fla.App., 215 So.2d 336; *International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service*, 400 F.2d 465. In *Ross v. Savage*, 66 Fla. 106, 63 So. 148 the Supreme Court held:

> ‘The entire instrument must be considered in order to gather the real intent and to determine the true design of the makers thereof. To that end all the different provisions of such instrument must be looked to, and all construed so as to give the effect to each and every of them, if that can reasonably de done. . . .’
>
> ‘When parties deliberately put their engagement into writing, in such terms as import a legal obligation without any uncertainty as to the object or extent of engagement, it is, as between them,

> conclusively presumed that the whole engagement and the extent and manner of their undertaking is contained in the writing. . . . No other language is admissable to show what they meant or intended, and for the simple reason that each of them has made that to be found in the instrument the agreed text of his meaning and intention.'

In the case of *Perry v. Woodberry*, 26 Fla. 84, 7 So. 483, this principle was stated over seventy years ago and continues to be the law of Florida and does bar the consideration of any extensive evidence to explain or vary the express terms of a contract unless an ambiguity of a contract is first found to fairly appear. *See Dimension Four International, Ltd. v. Huskey Realty*, Fla.App., 325 So.2d 34; *Black v. Clifton*, Fla.App., 284 So.2d 465; *Graham v. Graham*, Fla.App., 277 So.2d 540; *Hamilton Construction Co. v. Board of Public Instruction*, Fla., 65 So.2d 729; *Parkleigh House, Inc. v. Wahl*, 97 So.2d 714. The above stated cases taken together adhere to the principle that the courts are allowed to consider extrinsic evidence only when confronting an ambiguous contract provision, and they are barred from using evidence to create an ambiguity to rewrite a contractual provision, or to vary a party's obligation under a contract.

It is necessary to look to the balance of the entire agreement to see what the intent of the parties were. The last clause of Paragraph 6 where 'purchaser agrees to accept the premises 'as is' as of the date hereof can logically be read in conjunction with Paragraph 1A without ambiguity. There is under Paragraph 1A language specifically relating to the zoning question in that appellant agreed to convey good and marketable title subject to zoning 'existing at date of closing of title'. The court cannot interpret a general clause, the last phrases of Paragraph 6, in a manner directly contrary to a specific clause, Paragraph 1A. However, there must be an attempt made to give the last phrase in Paragraph 6 a reasonable meaning. Paragraph 6 is obviously a clause inserted to protect the seller by the limitation of representations for which he will be held responsible. There is no ambiguity in that portion of Paragraph 1A or of Paragraph 6 sufficient to justify the admission of parol evidence.

* * *

This cause is hereby reversed and remanded to the court below with direction to enter an order for specific performance in behalf of appellant Penney containing such provisions that are not inconsistent herewith.

Reversed.

3. Rules of Construction

It is hard to imagine a merger or integration clause that would be ambiguous to the degree that it would permit resort to a rule of construction such as *construction against the drafter*. This question would almost certainly be answered in one of the prior two stages of testing, i.e., *via* the *plain meaning* test or the *four corners* test. Review of Florida case law indicates a lack of precedent on this question. This does, however, provide an opportunity to more fully consider the role of rules of construction in contract interpretation. Please note that this concept applies to any interpretation issue and not just on the question of integration, and therefore it applies as well to the material covered in Chapter 14, Subsection 3. As the excerpted opinion below and the cases cited therein indicate, rules of construction should be used only as a last resort. Worthy of note is the legal statement and citations that follow, however. Realistically, the last legal statement in the following case excerpt would appear to favor use of the holistic test (Test #4) by resort to the parties' statements and conduct. As has been alluded to before, the Florida courts have not made particularly clear which rules take precedence in the hierarchy. The tests set out at the beginning of both this Chapter and Chapter 14 suggest a hierarchy based on the degree to which a possible source of evidence is extrinsic to the potentially ambiguous term(s).

DSL INTERNET CORP. v. TIGERDIRECT, INC.

District Court of Appeal of Florida, Third District, 2005

907 So. 2d 1203

RAMIREZ, J.

DSL Internet Corporation appeals the trial court's final judgment entered in favor of defendant TigerDirect, Inc., ratifying and approving the General Master's report. We affirm because the General Master's findings and conclusions are supported by competent and substantial evidence in the record concerning the parties' intentions when they entered into the subject marketing agreements.

DSL is an internet service provider that sells high speed digital subscriber line services to companies and individuals. TigerDirect is a corporation that markets goods and services provided by others in exchange for commission payments to TigerDirect. TigerDirect's services offered to DSL included the placement of DSL's information on TigerDirect's website and DSL's ads in TigerDirect's catalogs. During the parties' business relationship, TigerDirect provided DSL advanced drafts of the ads to be placed in the catalog issues and on the website, and DSL would approve the placement and format.

TigerDirect placed the DSL advertisements in its catalogs and website pursuant to various agreements, two of which were written agreements entered into in August and October of 2000 that contained a specific duration period.

Mario Bustamante, DSL's President and CEO, actively participated with Kevin Hamann, TigerDirect's Marketing Manager, in initial contract negotiations. Demitrio Rico, DSL's Sales Vice-President, actively participated in subsequent contract negotiations, and Bruce Matthews, TigerDirect's Vice-President of Business Development, similarly participated in contract negotiations. At issue in this case is the amount DSL owes TigerDirect under a written agreement entered into in January of 2001 which Hamann negotiated with Rico. In this agreement, TigerDirect agreed to include a full-page advertisement in its catalog “Issue 02-04, 2001” and on its website. The agreement lists various conditions, including $15,000.00 as the minimum guaranteed revenue.

The General Master issued his Report and Recommendation in favor of TigerDirect in the amount of $15,210.00, plus interest and an award of attorney's fees. The General Master determined that DSL's minimum payment obligation under the January 2001 agreement covered a period of three months and required a minimum payment of $36,000.00. The General Master found that the terms of the agreements were ambiguous with respect to DSL's minimum guaranteed payment, but found that the general rule which requires that contracts be construed in favor of the non-drafter did not apply because the individuals who negotiated the agreements were sophisticated parties.

We find that there is competent substantial evidence to support the General Master's finding that the January 2001 agreement covered three months, February through April 2001, and required DSL to compensate TigerDirect in excess of $15,000.00. Florida law requires that a contract be interpreted against the drafter when the contract contains ambiguous terms. *See Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla.1979). The construction-against-the-drafter principle is a rule of last resort and is inapplicable when there is evidence of the parties' intent at the time they entered into the contract. *See Child v. Child*, 474 So.2d 299 (Fla. 3d DCA 1985). *See also The School Bd. v. Great Am. Ins. Co.*, 807 So.2d 750, 752 (Fla. 4th DCA 2002). Parol evidence is admissible to determine the meaning of ambiguous terms through the parties' own statements and conduct. *See Berry v. Teves*, 752 So.2d 112, 114 (Fla. 2d DCA 2000); *First Capital Income and Growth Funds, Ltd.-Series 12 v. Baumann*, 616 So.2d 163, 165 (Fla. 3d DCA 1993).

* * *

4. The Holistic Approach: Corbin, Restatement (Second) Contracts, & U.C.C. Article 2

A. Common Law

CENTENNIAL MORTG., INC. v. SG/SC, LTD.

District Court of Appeal of Florida, First District, 2000

772 So. 2d 564

WEBSTER, J.

In these three consolidated appeals, Centennial Mortgage, Inc., seeks review of a final judgment which, among other things, held that it had breached an option contract relating to the sale and purchase of an apartment complex, and granted the request of SG/SC, Ltd., for specific performance. Because we conclude that the trial court erroneously excluded parol evidence proffered by Centennial, we reverse and remand for further proceedings.

At the non-jury trial, a major point of dispute involved which party had breached the written option contract. Centennial contended that SG/SC had breached the contract by failing to fund its portion of cost overruns attributable to renovation of the apartment complex. SG/SC maintained that it had no obligation to contribute to cost overruns, and that Centennial had breached the contract by failing to close the transaction. The parties agreed that the option contract did not address the topic of renovation-cost overruns. Centennial contended that this omission constituted a latent ambiguity, and that, therefore, parol evidence was admissible to assist the trial court in determining what the parties would have included in the contract had they anticipated the possibility of cost overruns. The trial court agreed with SG/SC that the contract was not ambiguous and, accordingly, refused to consider the parol evidence proffered by Centennial. This was error.

It is clear from the evidence presented at trial that neither party contemplated the possibility of renovation cost overruns when they executed the contract. Given this undisputed fact, we find the following discussion from *Hunt v. First National Bank of Tampa*, 381 So.2d 1194 (Fla. 2d DCA 1980), instructive:

> If a contract is clear, complete and unambiguous, there is no need for judicial construction.... But even the most cautious drafting, and the most exhaustive imagination, rarely covers every possible contingency. If a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations, then the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document. This

> insufficiency is called a latent ambiguity, and ... courts ... are frequently called upon to determine what the parties would have included in their contract had they anticipated an occurrence which they in fact overlooked.... In so doing, the function of the court is to ascertain, insofar as possible, the intent of the parties.... Extrinsic evidence is not only admissible on that issue, but is frequently required where the instrument itself does not provide sufficient insight into intent.

Id. at 1197 (footnote and citations omitted).

SG/SC contends that the parol evidence proffered by Centennial is barred by the parol evidence rule, the statute of frauds (§ 725.01, Fla.Stat.(1995)) and an integration clause contained in the contract. We disagree. As Hunt demonstrates, parol evidence is admissible to resolve latent ambiguities such as the one at issue here. The statute of frauds does not come into play for the simple reason that the contract at issue is in writing. As we said in Outlaw v. McMichael, 397 So.2d 1009, 1011 (Fla. 1st DCA 1981), the purpose of integration clauses "is to affirm the parties' intent to have the parol evidence rule applied to their contracts." However, we also said that "[t]he modern trend ... is for the courts to allow parol evidence, even in cases where a contract contains an integration clause, in order ... to explain an ambiguity in the contract." Id. (citation omitted).

Professor Corbin's treatise supports such an approach:

> No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined what the writing means.... Even if a written document has been assented to as the complete and accurate integration of the terms of the contract, it must still be interpreted; and all those factors that are of assistance in this process may be proved by oral testimony.

3 Arthur Linton Corbin, Corbin on Contracts § 579, at 412-13 (1960).

"[T]he existence of ambiguity in a contract is a question of law." *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 905 (11th Cir.1998) (applying Florida law). Accordingly, exercising our power of de novo review, we hold that the trial court erred when it concluded that the contract was not ambiguous regarding responsibility for renovation-cost overruns. However, the parties' intent regarding that topic is a question of fact. Id*. See also Land O'Sun Realty Ltd. v. REWJB Gas Inv.*, 685 So.2d 870, 872 n. 3 (Fla. 3d DCA 1996) ("Contract interpretation is for the court as a matter of law, rather than the trier of fact, only when the agreement is totally unambiguous, or when any ambiguity may be resolved by applying the rules of

construction to situations in which the parol evidence of the parties' intentions is undisputed or non-existent"), *review dismissed sub nom. Lennar Florida Partners, 1 v. REWJB Gas Inv.*, 710 So.2d 978 (Fla.1998). Accordingly, we reverse, and remand. On remand, the trial court shall reconsider this case, taking into account the parol evidence proffered by Centennial, including that of the parties' conduct regarding responsibility for renovation-cost overruns. *See, e.g., Russell v. Gill*, 715 So.2d 1114, 1116 (Fla. 1st DCA 1998) (noting the importance of conduct of the parties to a contract in determining intent). This remand does not contemplate the presentation of additional evidence. In light of this resolution, we consider it unnecessary to address the other issues raised by Centennial.

REVERSED and REMANDED, with directions.

B. Sale-of-Goods Contracts

FLA. STAT. § 672.202 (2017) provides as follows:

> Final written expression; parol or extrinsic evidence.—Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (1) By course of dealing or usage of trade (§ 671.205) or by course of performance (§ 672.208); and
>
> (2) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The following case concerns sale of an automobile and related financing arrangements. It also deals with a matter that has often proved problematic in contract law – the requirement of arbitration instead of taking disputes to an appropriate court of law. The distinction between parol and extrinsic evidence is emphasized, and there is an interesting twist: whether agreements signed contemporaneously, which are often read in conjunction, are excluded parol evidence where there is a merger or integration clause. Note that the following case also addresses the related concept of a *collateral agreement*.

DUVAL MOTORS CO. v. ROGERS

District Court of Appeal of Florida, First District, 2011

73 So. 3d 261

LEWIS, J.

Duval Motors Company d/b/a Duval Ford, Appellant, seeks review of an order denying its motion to compel arbitration of several claims filed by Cassandra and Alton Rogers, Appellees. Appellant contends that the parties have a valid agreement requiring arbitration of Appellees' claims. For the reasons explained below, we disagree with Appellant and affirm the trial court's decision.

On June 19, 2009, the parties signed multiple documents related to a vehicle purchase transaction. One of those documents is the Retail Installment Sales Contract ("RISC"). The RISC identifies Appellees as the Buyer and Co–Buyer and Appellant as the Seller–Creditor. It then sets forth the following terms:

> You, the Buyer (and Co–Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Seller—Creditor (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below.

The RISC identifies the vehicle being purchased and provides the financial terms of the purchase, including the down payment, the total sale price, the total amount financed, the annual percentage rate, the total finance charge, and a payment schedule. The RISC also contains a warning that state law does not provide a "cooling off" period for the transaction and that Appellees are not entitled to cancel the contract simply because they change their minds. Additionally, the RISC provides that Appellant "may assign this contract." Finally, and most importantly, the RISC contains the following merger clause:

> HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding.

The RISC does not contain an arbitration agreement.

The arbitration agreement appears in a separate document, the Retail Buyer's Order ("RBO"), which was signed the same day. The RBO identifies the vehicle being purchased and lists the vehicle's price and the fees associated with the purchase. Additionally, the RBO provides that "[t]he retail installment sales

contract (“RISC”) to be entered between Dealer and Customer, unless otherwise indicated in writing by Dealer, shall be immediately assigned by Dealer to a bank / finance company (at face value or greater) which shall then be the creditor to whom Customer shall be obligated under the RISC.” It then states that the dealer has the right to terminate “this Order,” i.e. the RBO, if the dealer cannot obtain credit approval for the customer or if the dealer is unable to sell the RISC to a financial institution on terms of no less than face value. The RBO states that if the customer takes delivery of the vehicle before the dealer obtains financing approval, then delivery “serves as a convenience to Customer only and Customer does not have, nor will acquire, any rights or interests in the Vehicle by such delivery except Dealer's permission to use it, which permission can be revoked, requiring the Vehicle's immediate return to Dealer in the same condition as it existed when delivered to Customer.” Finally, the RBO purports to make financing approval a condition subsequent to the enforcement and validity of the RISC.

According to Appellees' complaint, they took delivery of the vehicle after signing all the documents associated with the transaction. They alleged that two weeks after they took delivery, Appellant demanded an additional down payment of $5,000. According to the complaint, Appellant took the vehicle from Appellees' possession after they refused this new demand. Appellees asserted seven causes of action arising out of these events. Instead of an answer, Appellant filed a motion to compel arbitration. The motion was based on the arbitration agreement in the RBO, which Appellant contends is part of the parties' contract. Appellees argued, among other things, that the merger clause precluded consideration of the RBO. After reviewing the language of the documents at issue and considering the parties' arguments, the trial court denied Appellant's motion, concluding that no binding arbitration agreement existed with respect to the transaction at issue. Based on the merger clause, we agree with the trial court. [Footnote omitted]

In determining whether to compel arbitration, a trial court is limited to three inquiries: “(1) whether a valid written agreement exists containing an arbitration clause, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived.” *Piercy v. School Bd. of Washington Cnty., Fla.*, 576 So.2d 806, 807 (Fla. 1st DCA 1991). In the instant case, the trial court concluded that no valid agreement to arbitrate existed relating to the transaction at issue. This conclusion was based on construction of the parties' contract. Therefore, it is subject to de novo review*. Gainesville Health Care Ctr., Inc. v. Weston*, 857 So.2d 278, 283 (Fla. 1st DCA 2003).

Interpretation of a contract begins with its plain language. *Taylor v. Taylor*, 1 So.3d 348, 350 (Fla. 1st DCA 2009). As a general rule, evidence outside the contract language, which is known as parol evidence, may be considered only when the contract language contains a latent ambiguity. [Footnote omitted] *Wheeler v. Wheeler, Erwin & Fountain, P.A.*, 964 So.2d 745, 749 (Fla. 1st DCA

2007*); Jenkins v. Eckerd Corp.*, 913 So.2d 43, 52–53 (Fla. 1st DCA 2005). Parol evidence includes "a verbal agreement or other extrinsic evidence where such agreement was made before or at the time of the instrument in question." *J.M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So.2d 484, 485 (Fla.1957). The parol evidence rule precludes consideration of such evidence "to contradict, vary, defeat, or modify a complete and unambiguous written instrument, or to change, add to, or subtract from it, or affect its construction." *Id.* at 486 (citation omitted); *see also Allett v. Hill*, 422 So.2d 1047, 1050 (Fla. 4th DCA 1982) (finding error in "the admission of parol evidence to add a term to [a] written lease which, whether part of the preliminary negotiations or a separate subsequent condition, plainly violates ... the doctrine of merger and the parol evidence rule").

The purpose of a merger clause is "to affirm the parties' intent to have the parol evidence rule applied to their contracts." *Centennial Mortg., Inc. v. SG/SC, Ltd.*, 772 So.2d 564, 565 (Fla. 1st DCA 2000) (*quoting Outlaw v. McMichael*, 397 So.2d 1009, 1011 (Fla. 1st DCA 1981)). Generally, a merger clause states "that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." *Jenkins*, 913 So.2d at 53 n. 1 (*quoting* Black's Law Dictionary, 813 (7th ed. 1999)). This Court has explained the significance of a merger clause as follows:

> Although the existence of a merger clause does not per se establish that the integration of the agreement is total, ... a merger clause is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing parol evidence to vary or contradict the written terms.

Id.

Appellant argues that the merger clause at issue exists only to establish that the contract cannot be modified orally and that "if it's not in writing, it did not happen." This interpretation is inconsistent with the plain language of the clause and the operation of the parol evidence rule, which excludes all evidence extrinsic to a fully integrated contract.[3] *See J.M. Montgomery Roofing*, 98 So.2d at 485. The RISC's merger clause does not specifically mention prior written agreements, but it explicitly provides that "this contract" is the "entire agreement" between the parties. As a result, it is immaterial whether any prior representations sought to be excluded are oral or written; anything that does not constitute part of "this contract" is not part of the parties' agreement related to the contract. Thus, whether the RBO should be considered depends on whether it is part of "this contract" as that phrase is used in the merger clause.

Based on the language of the RISC itself, it is clear that “this contract” refers only to the RISC. By its title, “Retail Installment Sale Contract,” the RISC purports to represent the parties' contract. More importantly, the RISC does not refer to any other document as part of the contract. As a result, the natural interpretation of the phrase “this contract,” as used in the merger clause, is the document on which the merger clause appears.

Moreover, even when the language of the RBO is considered, this conclusion is supported. The RBO does not refer to itself as a contract; instead, the RBO refers to itself as “this order” throughout the document. For example, the RBO contains a warning to the buyers not to sign until they have read and understood all the terms of “this order.” Thus, the two documents together reveal that “this contract” refers to the RISC, while “this order” refers to the RBO.

Appellant contends that this Court should not consider the RISC a fully integrated document because the RISC does not contain all the essential terms of the agreement. This argument appears to be based on the general principle that “if there has been no agreement as to essential terms, an enforceable contract does not exist.” *Irby v. Mem'l Healthcare Grp., Inc.*, 901 So.2d 305, 306 (Fla. 1st DCA 2005) (citation omitted). By extension of this principle, it stands to reason that if a document does not contain all the essential terms of an agreement, it cannot be considered a fully integrated contract. *See Jenkins*, 913 So.2d at 53 (“For the parol evidence rule to apply, ‘the written agreement must appear on its face to express an agreement complete in all essential terms.’ ”) (*quoting Gulf Atl. Towing Corp. v. Dickerson, Inc.*, 271 F.2d 542, 546 (5th Cir.1959)). Appellant claims that only the RBO contains important terms such as the price of the vehicle, the sales tax, the cost of a vehicle maintenance plan, a rebate to the buyers, and the amount of the down payment. To the contrary, the only item on Appellant's list that is not included in the RISC is the “cost of a vehicle maintenance plan.” [Footnote omitted] However, this item is not an essential term, as such a plan is not required to show that there was an agreement by the buyers to purchase the vehicle and an agreement by the seller to deliver the vehicle. The terms showing such an agreement indicate that there was consideration for the contract. Thus, the contract is complete without discussion of a maintenance plan.

Appellant also argues that case law requires this Court to interpret the term “this contract” as referring to all the documents signed contemporaneously with the RISC in conjunction with the sale of the vehicle. Appellant's argument is based on the general principle recognized in *Dodge City, Inc. v. Byrne,* 693 So.2d 1033, 1035 (Fla. 2d DCA 1997), that “[w]hen the parties execute two or more documents concurrently, in the course of one transaction concerning the same subject matter, the documents must be read and construed together.” This principle also requires reconciliation, if possible, of

all provisions of the documents that are contemporaneously executed. See id. The Dodge City case also concerned a vehicle purchase transaction and documents similar to the ones at issue in this case. See id. However, the Dodge City opinion does not indicate that the RISC or any other document executed in conjunction with the sale contained a merger clause (or that the parties made an issue of such a clause). See generally id. The parties have not cited any Florida case specifically analyzing whether this principle applies when a document containing a merger clause is executed contemporaneously with other documents.

We find two out-of-state cases persuasive on this point: *Krueger v. Heartland Chevrolet, Inc.*, 289 S.W.3d 637 (Mo.Ct.App.2009); and *Patton v. Jeff Wyler Eastgate, Inc.*, 608 F.Supp.2d 907 (S.D.Ohio 2007). Both jurisdictions follow the principle recognized in Dodge City, but both courts nevertheless required consideration of only the RISC in interpreting the parties' rights and obligations related to a vehicle purchase transaction. *Krueger,* 289 S.W.3d at 640; *Patton*, 608 F.Supp.2d at 915–16.

In *Krueger*, in conjunction with the purchase of a vehicle, the buyers signed a Retail Buyer's Order, an Arbitration Addendum to the Retail Buyer's Order, and a Retail Installment Contract. 289 S.W.3d at 638. The Retail Installment Contract set forth the terms of the agreement based on a credit purchase of the vehicle and did not reference either the Retail Buyer's Order or the Arbitration Addendum to the Retail Buyer's Order. *Id*. The issue was whether the arbitration provision of the Retail Buyer's Order and its addendum were binding. Id. The Krueger court held that the arbitration agreement was not binding based on the following merger clause in the Retail Installment Contract:

> Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

Krueger, 289 S.W.3d at 639 (emphasis added in Krueger). Based on this language, the Krueger court held that the Retail Installment Contract was intended to supersede the Retail Buyer's Order and that the Retail Installment Contract was “the only agreement controlling the sale and purchase of the vehicle.” *Id*. at 640. The Krueger court distinguished a case with similar facts based on the existence of the merger clause. *Id*.

In *Patton*, the terms of the retail installment sale contract were strikingly similar to those of the RISC in the instant case. *See* 608 F.Supp.2d at 908–09. The seller in *Patton* was identified as the "Creditor–Seller," and the retail installment sale contract contained an agreement by the buyers to pay the Creditor–Seller the amount financed according to a payment schedule. *Id*. The merger clause in *Patton* was virtually identical to the merger clause at issue in the instant case. *Id*. at 909. The retail installment contract in *Patton* also contained the same warning about the lack of a "cooling off period" that the RISC in the instant case contains. *Id*. In *Patton*, the buyers also signed a separate "Purchase Spot Delivery Agreement," indicating the buyers' understanding that financing was not finalized and that the transaction would be complete upon assignment of the retail installment contract to a third party. Id. This agreement was similar to language contained within the RBO in the instant case. *See id*.

One of the issues before the *Patton* court was whether the spot delivery agreement rendered certain disclosures on the retail installment contract illusory. *Id*. at 913–15. This issue turned on whether the spot delivery agreement was part of the contract. See id. The *Patton* court concluded that the retail installment contract was a fully integrated contract. *Id*. at 915. To support this conclusion, the court noted that no language in the retail installment contract made it contingent on approval by or assignment to a third-party lender and that, by its terms, it obligated the buyers to make monthly installment payments to the seller. *Id*. The court further reasoned that certain provisions of the spot delivery agreement contradicted provisions of the retail installment contract. *Id*. In particular, the court concluded that the provision in the spot delivery agreement indicating that financing had not been finalized contradicted the terms of the installment contract that identified the seller as the "Creditor–Seller" and gave due dates for payments. *Id*. Further, the court noted that, although the retail installment contract indicated that the seller "may assign this contract," it did not make the contract contingent on assignment, as the spot delivery agreement purported to do. *Id.* The court concluded that the language in the retail installment contract providing for financing on specific terms and payments at specific times would be rendered meaningless if the language in the spot delivery agreement permitting the seller to cancel the contract were in force. *Id*. These inconsistencies, along with the merger clause, the lack of incorporation by reference of the spot delivery agreement into the retail installment contract, and the purpose of the Truth In Lending Act, which was at issue in that case, led the *Patton* court to conclude that the general rule requiring consideration of all contemporaneously executed documents did not apply to the retail installment contract. *Id*. at 915–16.

As noted above, the documents at issue in this case are strikingly similar to those discussed in *Patton*. Because we agree with the *Patton* court's

reasoning, we hold that the RISC in the instant case is a fully integrated document, consistent with the plain language of the merger clause.

This conclusion does not end our inquiry because Appellant argues that, even if the RISC is a fully integrated contract, the RBO constitutes a valid change to it. This argument is based on the merger clause's statement that “any change to this contract must be in writing and [the parties] must sign it.” We do not agree that the RBO constitutes a valid change to the RBO because nothing in the RBO indicates that it was intended as a modification of a pre-existing contract, and the parol evidence rule excludes evidence of other prior or contemporaneous agreements. Rather than indicating that it is a subsequent modification to the RISC, the RBO indicates that it was signed before the RISC, as it states, “The retail installment sales contract (“RISC”) to be entered between Dealer and Customer, unless otherwise indicated in writing by Dealer, shall be immediately assigned by Dealer to a bank/finance company ... which shall then be the creditor to whom Customer shall be obligated under the RISC.” (emphasis added). Because the RBO indicates on its face that it was signed before the RISC, it cannot be considered a “change” to the contract as that term is used in the merger clause; instead, the language in the RISC indicating that the RISC constitutes the entire agreement controls.

Notably, the RBO appears to incorporate the RISC by reference. *See Jenkins*, 913 So.2d at 51 (“A document may be incorporated by reference in a contract if the contract specifically describes the document and expresses the parties' intent to be bound by its terms.”) (citation omitted). This factor arguably distinguishes *Patton*, where neither document incorporated the other by reference. 608 F.Supp.2d at 909. However, this distinction is immaterial. As explained above, the terms of the RISC indicate that the RISC is the controlling instrument. Thus, the important inquiry is whether the RISC incorporates the RBO, not whether the RBO incorporates the RISC. The RISC does not mention the RBO. As a result, the RBO is irrelevant to the disputes arising out of the transaction at issue.

In sum, we affirm the trial court's decision to deny Appellant's motion to compel arbitration. This decision was correct because of the merger clause indicating that the RISC constitutes the entire agreement between the parties related to the contract governing the vehicle purchase. Accordingly, the order on appeal is AFFIRMED.

DAVIS, and WETHERELL, JJ., Concur.

* * *

[3] The parol evidence rule is often characterized as excluding evidence of an oral agreement. *See, e.g., Jenkins*, 913 So.2d at 53; *Sears v. James Talcott, Inc.*, 174 So.2d 776, 778 (Fla. 2d DCA 1965). However, as indicated by the use of the phrase “extrinsic evidence” in *J.M. Montgomery Roofing*, 98 So.2d at 485, the evidence excluded under the rule includes any evidence outside the instrument that is considered the fully integrated contract. *See also Burgan v. Pines Co. of Ga., Ltd.*, 382 So.2d 1295, 1296 (Fla. 1st

DCA 1980) (acknowledging that "the rule precludes evidence of understandings, parol or otherwise, which preceded a final integration of the parties' contract"); *Smith Eng'g & Constr. Co. v. U.S. Fid. & Guar. Co.*, 199 So.2d 302, 305 (Fla. 1st DCA 1967) ("[W]hen a legal act is reduced into a single writing, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.... No other language is admissible to show what they meant or intended ...."). (citation omitted).

5. Contract Integration Questions for the Jury (Fact-Finder)

It is unlikely that a person would articulate a *merger* or i*ntegration* clause that is so sketchy as to call for a factual inquiry into its existence. Just as to other *interpretation* matters, however, a court could turn over the question of integration to a jury. *See supra* Chapter 14, Subsection 6. This would be particularly appropriate where there were competing accounts about whether the parties intended for a writing to be the full and final expression of an agreement – which would entail consideration of truthfulness.

6. Three Primary Exceptions to the Parol Evidence Rule

The parol evidence rule does not prohibit consideration of several kinds of evidence. The first is *subsequent* evidence, such as letters, phone calls, written contract modifications, etc., that come after formation of the agreement in question. The second is for preconditions to a contract. If someone offers to buy an automobile in writing, but the parties discussed that it would not happen if the buyer did not get a new job within two weeks, then there is no formation problem unless the condition is satisfied (conditions are addressed in Chapters 16-16). The third also concerns a formation problem – i.e., when some impairment or problem supplies a defense to formation such as fraudulent misrepresentation, duress, or undue influence.

A. Subsequent Modifications

PAVOLINI v. WILLIAMS

District Court of Appeal of Florida, Fifth District, 2005

915 So. 2d 251

MONACO, J.

The appellants, Arturo Pavolini and Maria Rivera ("Borrowers"), seek reversal of the final summary judgment of foreclosure rendered against them by the trial court and in favor of the appellees, Winston Williams, et al. ("Lenders"). Because we conclude that the trial court erred in striking the affirmative

defenses raised by the Borrowers, and because there were issues of fact that were not excluded by the Lenders at the time summary judgment was granted, we reverse.

Lenders loaned $72,000 to the Borrowers, secured by a mortgage on real property that was to become the home of the Borrowers. The amended complaint alleged that several mortgage payments, real estate taxes and insurance costs had not been paid, and that a $1,500 deposit had not been made, all of which were required of the Borrowers by the promissory note. The Borrowers alleged as affirmative defenses that the “course of dealing” between the parties explained the late payment of taxes and insurance, that the $1,500 deposit had been waived, and that the mortgage payments had been timely paid, but were returned by the Lenders without a legal basis. The Borrowers alleged, as well, that the Lenders were estopped to assert a breach because of the course of dealing of the parties, and that the Lenders had acted with unclean hands because of a fraud in the inducement. The fraud claim was also the basis of a counterclaim and third-party complaint [Footnote omitted] brought by the Borrowers because of a purported representation by the Lenders that the roof of the structure was in good condition, even though it had a history of leaks.

Lenders filed a verified motion for summary judgment in which they indicated that the Borrowers defaulted under the note and mortgage by failing to make certain mortgage payments, tax payments, and insurance reimbursements, and by failing to make the $1,500 deposit. The Lenders also filed a verified motion to strike the affirmative defenses of the Borrowers. The Lenders acknowledged in the motion that they had received tendered money orders for the mortgage payments, but related that they returned the payments because they did not include late fees, or reimbursement for taxes or insurance. The legal argument concerning the affirmative defenses was essentially that there was no waiver or estoppel and that the Lenders denied that they acted with unclean hands. That's all.

The Borrowers each served an affidavit in opposition to the motion for summary judgment in which they swore that the monthly payments had been made, that the Lenders waived the $1,500, and that the parties had long-standing oral arrangements concerning the taxes and insurance. The affidavits also indicated that the Borrowers had by then paid all the insurance premiums and taxes required by the loan documents. Finally, the affidavits indicated that the Lenders had routinely accepted late payments from the Borrowers because the Borrowers are out of town for extended periods, and that the Lenders had given no notice of a change in policy in this respect.

The trial court entered an order striking the affirmative defenses without explanation, and granted a final judgment of foreclosure to the Lenders. From these orders the Borrowers appeal.

* * *

The same fate befalls the order striking the affirmative defenses. The parol evidence rule applies to verbal agreements between the parties to a written contract which are made before or at the time of execution of the contract. It does not apply to the admission of subsequent oral agreements that alter, modify, or change the former existing agreement between the parties. *See Wilson v. McClenny*, 32 Fla. 363, 13 So. 873 (1893), and *Vorzimer v. Kaplan*, 362 So.2d 451 (Fla. 3d DCA 1978). The First District noted in this connection:

> And the parol evidence rule has been specifically held to be inapplicable to oral agreements made subsequent to the execution of a promissory note, as between the parties to the note, in regard to the defense-such as that asserted here-of failure of consideration. [Cite omitted]. Consequently, if the oral modifications [purchaser] allegedly made were not made before or contemporaneously with the written contract, the parol evidence rule would not preclude the admission of such extrinsic evidence.

The Race, 573 So.2d at 410.

* * *

Accordingly, we reverse the final summary judgment and the order striking affirmative defenses, and remand for further proceedings.

REVERSED and REMANDED.

SAWAYA and PALMER, JJ., concur.

B. Preconditions to Formation

RMJ ENTERPRISES OF NORTHWEST FLORIDA, INC. v. BORG WARNER ACCEPTANCE CORP.

District Court of Appeal of Florida, First District, 1989

547 So. 2d 211

BARFIELD, Judge.

We affirm the final summary judgment entered against appellants in appellee's action for breach of personal guaranty and waiver agreements. The agreements secured the full and prompt payment of a corporate line of credit extended by appellee. [Footnote omitted] We reject appellants' argument that noncompliance with an alleged oral condition precedent to the delivery and

enforceability of the guaranty and waiver agreements voided the agreements "ab initio." Throughout the lending relationship, the line of credit operated as originally contemplated. If the procedure did in fact change, it did so only at the tail end of the relationship when appellee attempted to resolve the corporation's delinquent account. In other words, appellee complied with the alleged condition precedent in every financial transaction it funded, except the final one. Under these circumstances, we construe the condition precedent exception to the parol evidence rule to be inapplicable.[2]

We find no merit to the other issues raised by appellants. Accordingly, we AFFIRM.

SHIVERS, C.J., and ZEHMER, J., concur.

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[2] See Cockrell v. Taylor, 122 Fla. 798, 165 So. 887 (1936), in which the supreme court held that parol evidence was admissible to show that the delivery of a written agreement, unconditional on its face and fully executed, was subject to a condition precedent. The condition precedent exception to the parol evidence rule exists in order to establish that an agreement never became operative due to the failure of a certain condition or contingency, "hence there could be no modification or variance or contradiction of it as such." Ketchian v. Concannon, 435 So.2d 394, 395 (Fla. 5th DCA 1983). While we adhere to the priciple enunciated in these cases, we distinguish them based upon the particular facts of the present case.

C. Defenses to Enforcement

OUTLAW v. McMICHAEL

District Court of Appeal of Florida, First District, 1981

397 So. 2d 1009[39]

ERVIN, Judge.

The Outlaws appeal an order granting McMichael's motion to dismiss their amended complaint with prejudice. Because the appealed order did not state any specific grounds for dismissal, the parties have argued all nine grounds raised in the appellee's motion to dismiss as points on appeal. For the reasons stated infra, we reverse and remand with instructions.

The Outlaws' complaint alleged that during negotiations leading to the purchase of certain rental property from the seller, McMichael, that the latter's real estate agent made certain misrepresentations about the character of the property to be sold, and also alleged that McMichael breached the real estate contract, which was attached to the complaint, but which did not describe the property to be conveyed; instead a space for the property description was left unfilled by the parties. The first ground for dismissal

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asserted that the complaint failed to state that McMichael authorized or had reason to know of the alleged misrepresentations by a representative of his realtor. The amended complaint clearly alleged that a principal-agency relationship existed between McMichael and his realtor. In the normal real estate transaction, a real estate agent should have at least implied actual authority or apparent authority to make representations concerning the description and characteristics of the property to be sold. At the minimum, we cannot hold as a matter of law that a real estate agent does not have such authority. A principal is responsible for his agent's unauthorized representations, if true representations as to the same matter were within his authority, and if the third party had no notice that the representations were unauthorized. Sun Oil Co. v. Behring Properties, Inc., 480 F.2d 310 (5th Cir. 1973).

It can be logically inferred from the allegations in the complaint that the Outlaws did not have notice that the representations made by the realtor were false until they took occupancy of the premises. Moreover, a principal can be held liable for the misrepresentations of his agent notwithstanding his lack of knowledge. *See Wheeler v. Baars*, 33 Fla. 396, 15 So. 584 (1894).

Points 3 and 4 basically alleged that the complaint should have been dismissed because the warranties represented did not extend beyond the date of closing and that the Outlaws did not make a reasonable, timely inspection. *Johnson v. Oliver*, 249 So.2d 65 (Fla.1st DCA 1971), is to the contrary, holding that the buyer of real estate was not estopped to claim relief for alleged defects stemming from misrepresentations by the seller, although the buyer and seller had earlier made a written agreement after closing that the seller would remedy certain other minor defects. Finally, the Johnson court held that the reasonableness of a purchaser's inspection of the premises is a jury question. *See also Besett v. Basnett*, 389 So.2d 995, 998 (Fla.1980), in which the court reiterated the rule “that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.” As in Besett, it does not appear from the facts alleged in the complaint before us “that the (buyers) knew that the alleged misrepresentations were false....”

Point 5 raised the question whether the appellants' complaint adequately alleged a material misrepresentation by the seller who purportedly had advised the Outlaws that the existing tenants on the purchased property were paying their utilities. The appellee's defense was that since the appellants did not further allege the nature of the tenancies represented, the appellants had no assurance that the tenants would remain, enabling the appellants to require the tenants to pay utilities; therefore, the measure of damages was not ascertainable without pleading how long the landlord had assurance of having the tenants stay. This point also is not grounds for dismissal. The issue as to

certainty of damages is an evidentiary matter. *See Butler v. Mirabelli*, 179 So.2d 868 (Fla.2d DCA 1965).

Points 6 through 9 basically involve the issue whether the alleged oral misrepresentations would have been inadmissible under the parol evidence rule because of the following language in the contract:

> NO REPRESENTATIONS, guarantees, or warranties of any nature whatsoever which are not herein expressed and been made by any party hereto or their representatives.
>
> THIS CONTRACT SUPERSEDES AND REPLACES ALL OTHER CONTRACTS.

The above quoted language has been generically referred to as an integration clause. The purpose of such clauses is to affirm the parties' intent to have the parol evidence rule applied to their contracts. The modern trend, however, is for the courts to allow parol evidence, even in cases where a contract contains an integration clause, in order (1) to show that the parties did not intend for such language to be a complete statement of their transactions, *see Luther Williams, Jr., Inc. v. Johnson,* 229 A.2d 163 (D.C.App.1967), or (2) to explain an ambiguity in the contract. *See Blaha v. Schwartz*, 7 Ohio Op.3d 234 (Ohio Com.Pl. 1977). Here the omitted description of the property in the sales contract is the central factual concern in the appellants' claim. Therefore, we hold that the parol evidence rule does not render appellants' complaint defective because the sales contract's incomplete provisions will apparently have to be clarified by parol evidence, a recognized exception to the parol evidence rule. *See generally* cases cited in 23 Fla.Jur.2d, Evidence, ss 344, 345 (1980).

In summary, most of the appellee's points raised in his motion for dismissal could be better characterized as affirmative defenses. Our holding does not preclude the appellee from so re-raising these issues, some of which might become viable at a later stage in the proceedings.

Reversed and remanded for further proceedings consistent with this opinion.

SHAW and WENTWORTH, JJ., concur.

Problem 16-1

Buyer visited Seller at Seller’s used-car lot. As Buyer was looking over a used car, Seller began telling him about the virtues of the vehicle being considered. When Buyer became hesitant to purchase, Seller showed him a sixteen-point checklist and said, “You see this? This is the checklist that our mechanics use to verify that the main mechanics like brakes, drive train and engine are all in

top shape. On this vehicle, all sixteen items in the checklist were described by the mechanic as “very good” or “excellent.”” Buyer asked Seller to sign the checklist and include it in the financing package – to which Seller said “No problem, but 1 have to get the mechanic to sign it too. Just sign the purchase and financing documents and 1’ll be over in a minute with the checklist.” The purchase agreement contained a merger clause. Seller left for the day without giving Buyer the checklist. The vehicle that Buyer purchased broke down within days. Will discussion of the checklist or the checklist itself make its way into evidence in a lawsuit by Buyer against Seller? Why or why not?

Problem 16-2

Homeowner contracted for Painter to repaint the interior of Homeowner’s home. The contract contained a merger clause. A week into the painting, Painter wrote a note saying, “Need $200 more if you want the matte finish paint that you liked – price went up. That okay?” Homeowner wrote “Ok” on the same note and initialed it. Would the note be allowed into evidence if Painter introduced it in a suit against Homeowner for the extra $200? Why or why not?

Problem 16-3

College Student discussed the possibility of selling his favorite violin to Neighbor, telling Neighbor that he would not need it since he expected to get a new violin for his birthday in a few days. College Student then wrote out a short contract that he was “selling the violin for $400, pick-up sometime next week.” Unfortunately, College Student got a new sweater for his birthday and not a new violin. Neighbor is ready to tender the $400 and now seeks to enforce the contract of sale. In this claim, Neighbor would win or lose depending whether College Student can introduce into evidence the verbal discussion of his birthday and the possibility of receiving a new violin. What result, and why?

Problem 16-4

The preceding three questions address a different exception to the parol evidence rule but in a different order than presented in the text immediately above. Can you determine which category applies to which problem? Does calling for identification of things that are not in the outline-listed format typical of many/most study resources prevent or foster a well-rounded understanding?

Note

You may recall from Chapter 3 that where a sale of goods is involved, a state's adoption of the Uniform Commercial Code's Article 2 applies. This is, however, supplemented by the common law principles where the Code provisions do not address something. The situation of contract integration is addressed, in FLA STAT. § 672.202 (2017) and its U.C.C. counterpart, Article 2, § 2-202. In fact, the "integration" question is one of interpretation (i.e., "whether or not parol evidence may be introduced based on the intent of the parties regarding the comprehensiveness of the final written manifestation of their agreement"). There is no reason why the same rules would not apply to other questions of interpretation. Further, the provision just referenced is far from complete, and therefore requires supplementation by the common law. These are good examples of areas that the drafters of the U.C.C. left, at least in large part, to the common law. Thus, on a bar exam dealing with interpretation of a potentially ambiguous term, one could write something like "Although this is the sale of goods and therefore the state's adoption of U.C.C. Article 2 mandatorily applies, the Code does not significantly cover interpretation issues (with the exception perhaps of the integration issue) and therefore it is supplemented by common law principles." Almost a CMM Approach, stating up front the right laws to be applied, and why, is very good practice.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 16

50. How does parol evidence (this Chapter) differ from extrinsic evidence (Chapter 14)?
51. To what does the parol evidence apply? What are the primary exceptions to the rule?
52. What are the differences between the parol evidence rule as used in common law cases and sale-of-goods cases, if any?
53. What is meant by the idea that parol evidence/integration is a question of *substantive* law?

SUGGESTED EXERCISES

(40) Have students research the two non-Florida cases upon which the court in *Duval Motors Corp.* rely (Missouri and South Dakota). Have these been cited at authority in other jurisdictions as well?

(41) Have students research and to report on find Florida cases that cite FLA. STAT. § 672.202 (2017).

CHAPTER 17: Express and Implied-in-Fact Conditions

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Failure to properly perform a contractual duty entitles a non-breaching party to remedies that include termination of the contract, suspension of performance until a breach is corrected, and/or the right to damages for the breach. The nature of damages for breach was addressed earlier in Chapters 9 – 12. In sharp contradistinction, failure of a condition either prevents a

contractual duty from arising or such failure terminates an existing duty. Breach of a duty establishes a right to remedy. Failure of conditions prevent the creation of, or cut off, a contractual duty. For example, if a painter does a poor job of painting a homeowner's home despite requirements of a contract, the homeowner would be entitled to appropriate damages that could include things like the extra cost of hiring a new painter to remedy the flaws. In stark contrast, the condition that a painter finish a job by the end of the summer forestalls the formation of a homeowner's responsibilities under the contract if it fails. In the case of a condition, it is as if there were no contract between the parties when the condition is not satisfied. (Preconditions also stand as exceptions to the parol evidence rule – Chapter 16, Section 6.C.) This Chapter begins with the "*what"* of conditions – what they do/how they operate. Where the contractual language is unclear, whether something is a condition to be satisfied or a duty to be performed will almost certainly lead to a battle over interpretation (addressed in Chapters 14 and 18). In some cases, having no duty or having a duty terminated is better than having to seek damages for breach.

This Chapter then turns to "*how"* conditions are created. They may be created by specific agreement of the parties, i.e., *expressly*. There are also cases where the facts and circumstances, including perhaps how the parties acted in the past with regard to similar contracts, allow for conditions to become part of the bargain, i.e,, *impliedly*. The Chapter next turns to "*when"* a condition operates – either before a duty arises (*precedent*), or at the same time as the other party's performance is due (*concurrent*), or after a duty has already arisen (*subsequent*). Finally, this Chapter considers several of the most common forms of condition used in contracts.

The Chapter that follows addresses the other major mechanism by which conditions are introduced into contracts: implied-in-law. As noted in Chapter 4, this is typical for sale-of-goods cases. The same is possible for common law situations. The same policies such as the implied duty to act in good faith fine their way into common law contracts as well. A note of caution – the two main headings in the title for the next Chapter are diametrically opposed to each other, contractually speaking. Knowing when to carefully draft one or the other, or to advocate in litigation one or the other, is a major take-away from Chapter 18.

CMM Approach: The difference between damages for breach on the one hand, and the prevention of duty or its termination on the other, is so important that the authors recommend strict adherence to specific terminology. Contracts, or more accurately obligations contained therein, may be *breached*; conditions may have *failed* (i.e., "breach" on the one hand, and "failure" on the other). At minimum, remembrance of different terminology

may assist in the ability to recall that there are differences in the legal operation of both concepts.

1. Conditions versus Promises

The Restatement (Second) Contracts defines "condition" in its § 224 as "[ ] an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981). If a condition fails, the party to whom it is owed has no duty, or has an existing duty that is terminated. If a promise is breached, the damage is the measure of the thing promised compared to how it was performed. Thus, if there is a breach of promise but some of the performance has been done, there is still some recovery for the breaching party. Again, some examples should make things more clear. If a homeowner hires a painter who will only be paid if the house is painted by the end of the month by way of condition, the failure to finish by the end of the month technically means that the homeowner does not have a duty to pay. On the other hand, if the painter promises to paint and to finish by the end of the month but fails, the breach of the painter's promises entitles the homeowner to damages, perhaps a reduction in contract price to be paid – but not zero, as would be the case for the failure of a condition precedent. What this means is that promises lead to less likelihood that a breaching party gets nothing – which is often good public policy. If the painter did half the job, why not require the homeowner to pay half of the contract price (less any extra costs of having the job completed by someone else)? This avoids forfeiture by the painter. The public policy of avoiding forfeiture manifests itself in areas such as that covered by Restatement (First) Contracts section that follows.

Restatement (First) § 261 Interpretation of Doubtful Words as Promise or Condition

> **Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise; but the same words may sometimes mean that one party promises a performance and that the other party's promise is conditional on that performance.**

As stated before, the law is not static, and as new problems arise and as understanding of the law improves or as policy changes, the law changes with it. This change is often reflected in the differences between the Restatement (First) Contracts and the Restatement (Second) Contracts. In some cases the rule is changed. In other cases, the rule is further defined or supplemented. It may be instructive to compare Restatement (First) Contracts § 261 with Restatement (Second) Contracts § 227. The First Restatement is not abrogated, but it is supplemented and improved. Note that the Second Restatement memorializes the policy of trying to avoid forfeiture.

Note

At the beginning of Chapter 14, we noted that there are two common interpretation problems, in addition to the myriad, other possible ambiguities of contractual terms. The first, integration, was addressed in Chapter 16. This is the second one, i.e., whether to interpret some contractual requirements as a condition or as a promise (failure versus breach). The public policy considerations should now be obvious. (The third is straight-up terminology clarification, e.g., does "red" in the contact mean "brick red" or "fire engine red"? With a set contract price, and assuming that the cost of manufacturing by use of one color is much more expensive, one can imagine the keen interest in the interpretation).

2. Express versus Implied-in-Fact Conditions

There are actually three ways to create conditions. First, conditions may be created expressly by words, either oral or written (the possibility of a writing requirement is a separate issue covered in Chapter 13). Second, conditions may be implied in fact, perhaps by how the parties have always acted during previous contractual arrangements. As an example, if one party to numerous contracts has always been the one to insure the performance, but not in writing, it is reasonable to imply that the same party would be insuring a new agreement of the same nature. (That party will argue otherwise if there is an insurable event, of course). Finally, conditions may be implied-in-law.

Courts sometimes impose conditions in contracts as a matter of policy. The best example is probably the implied duty of parties to the sale of goods to act in good faith and in accordance with principles of fair dealing. (Do not forget…the same is true for common law contracts). The parties may never have discussed it nor may there be evidence that they have practiced it in the past, and yet a court may include it in the parties' dealings.

A. Express Conditions

GUNDERSON v. SCHOOL DISTRICT OF HILLSBOROUGH COUNTY

District Court of Appeal of Florida, First District, 2006

937 So. 2d 777

WOLF, J.

In this workers' compensation appeal, the claimant's widow, as personal representative of his estate, seeks to enforce a settlement agreement signed by the deceased and his former employer (E/C) immediately prior to his death.

Because we find the settlement agreement became a binding, enforceable contract upon the later entry of an order approving attorney's fees, we reverse the trial court's order denying the claimant's widow's request to enforce the agreement.

The disputed settlement agreement read in its entirety:

> This is a Washout Settlement under F.S. 440.20(11).
>
> Parties agree to a complete and final settlement of all claimant's claims for medical care and indemnify for $52,808 inclusive of attorney's fees and costs. [Claimant] to pay $9,000 fees and $3,308 costs.
>
> Claimant agrees to execute a general release and voluntary resignation. General release will not affect any vested pension or defined compensation rights.
>
> Parties understand settlement is effective and binding upon entry of order approving motion for attorney's fees.

Both parties concede that the claimant failed to execute a general release or sign a voluntary resignation prior to his death. Both parties equally concede that the claimant's widow sought and received an order approving her motion for attorney's fees as personal representative of her husband's estate and later executed a general release and voluntary resignation on her husband's behalf. The E/C argues the deceased's failure to execute these documents prior to his death negates its duty to pay the settlement fee. However, the claimant's widow asserts that her execution and service of both the general release and a voluntary resignation, as personal representative of the deceased's estate, amounts to performance of the contract, thereby requiring performance on the E/C's part. The E/C never objected to the form of the voluntary release or resignation, but merely objected because they were not executed by the claimant prior to his death.

* * *

In defense of its failure to perform the settlement agreement, the E/C asserts that the deceased's execution of the general release and voluntary resignation were either conditions precedent or conditions subsequent to the formation of a valid contract and, thus, the failure to execute the documents renders the settlement agreement non-binding. This argument is without merit. Provisions of a contract will only be considered conditions precedent or subsequent where the express wording of the disputed provision conditions formation of a contract and or performance of the contract on the completion of the conditions. *See In re Estate of Boyar,* 592 So.2d 341, 343 (Fla. 4th DCA 1992) (holding conditions precedent are not favored, and clauses will not be

construed as conditions precedent unless the plain, unambiguous meaning of the contract requires the court to do so); *see also Quinlan,* 932 So.2d at 428 (holding that an agreement to settle entered into upon mediation of a workers' compensation settlement never materialized into a binding contract where the expressly written conditions to enforcement were never met); *Black's Law Dictionary,* 312 (8th ed. 2004) (defining a condition subsequent as a condition that, if it occurs, will bring something else to an end; an event the existence of which, by agreement of the parties, discharges a duty of performance that has arisen).

No such wording exists in the disputed contractual provisions. The only conditional wording found in the agreement conditioned the binding nature of the agreement upon the deceased claimant's receipt of an order approving his motion for attorney's fees. Thus, the execution of the general release and the voluntary resignation were not conditions to the contract's performance or creation. In addition, the deceased claimant's wife's filing of a motion seeking approval of attorney's fees, as personal representative of her husband's estate, and later receipt of an order approving the motion for attorney's fees, created a binding settlement agreement per the express conditional wording of the settlement agreement.

The settlement agreement became a binding contract upon the wife's receipt of the order approving attorney's fees. Thus, the E/C may be excused from performance of the settlement agreement only if the wife's execution as personal representative of the deceased's estate of the general release and voluntary resignation did not amount to performance under the contract's terms. The general rule is that contracts for personal services contain an implied condition that such contracts dissolve at the time of the contractor's death. *See CNA Int'l Reinsurance Co., Ltd. v. Phoenix,* 678 So.2d 378, 380 (Fla. 1st DCA 1996). Restatement (Second) of Contracts § 262 defines a contract for “personal services” as a contract where the existence of a particular person is necessary for the performance of a duty. In addition, section 733.612(2), Florida Statutes (2004), authorizes a personal representative to “perform or compromise, or when proper, refuse to perform, the decedent's contracts....” Similarly, section 733.612(24), Florida Statutes (2004), authorizes a personal representative to “satisfy and settle claims.”
The main purpose of this settlement agreement was to bring to a close all litigation regarding the claimant's workers' compensation claims in return for a settlement payment. The duty of performance on the claimant's part was a duty which could statutorily be performed by his representative in the event of his death through the effectuation of the necessary documents. These were not duties which the claimant's death rendered impossible to perform.

More importantly, the death of a claimant following the execution of a settlement agreement will not affect the agreement's enforcement if the personal representative can show that a binding contract was

reached. *See Jacobsen v. Ross Stores,* 882 So.2d 431 (Fla. 1st DCA 2004). Here, a binding contract was reached at the entry of the trial court's order approving attorney's fees. In addition, the claimant's widow's general release serves to alleviate all fears of further litigation where she, as the representative of the claimant's estate, is the only individual who could litigate claims on the deceased's behalf. Moreover, by virtue of his death, the E/C may rest assured that the claimant will not demand further employment. As such, the claimant's widow's effectuation of the necessary documents performed all duties required of the claimant, rendering the binding settlement agreement non-personal in nature, and requiring performance on the E/C's part.

REVERSED AND REMANDED.

Problem 17-1

Sam, knowing that Brooke is in the market for a used textbook for her upcoming Torts class, approaches Brooke on May 1 and offers to sell her his used Torts textbook for half price. Before Brooke accepts, Sam adds, "1'll sell you my book if 1 pass the course when grades come back on May 5." How would you characterize the aspect about passing Torts? When would Brooke have a right to the book, if at all?

B. Implied-in-Fact Conditions

Case law in Florida is not always clear on the distinction between different forms of implied contractual terms. Entire contracts may be implied by the facts, which is epitomized by U.C.C. § 2-207(3) (FLA. STAT. § 672.207(3) (2017)). This U.C.C. Article 2 mechanism cobbles together an agreement from mere negotiations – constructing a contract from those terms on which the parties agree, together with gap-fillers.[40] This is addressed in Chapter 4. For the common-law counterpart, it is necessary to shift gears and move to equitable remedies addressed in Chapter 12. Where a contract has not actually been formed, courts may imply one in law, an *implied-in*-law contract (also known as a *quasi contract* or is sometimes expressed as *quantum meruit*).

Sometimes the existence of a contract is clear but it may be missing terms. The U.C.C. (and state adoptions of it) includes common gap-fillers such as for an *open price term*.[41] Similarly, actions and statements that parties make in relation to common law contracts such as for services may also create implied-in-fact terms, which derive from the parties' conduct. Restatement (Second) Contracts § 204 provides the following:

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> When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Are implied-in-fact *conditions* different than implied-in-fact *terms*? This may be a distinction without a real difference. Review of Florida cases indicates some potential confusion in terminology between implied-in-fact contracts, implied-in-fact conditions, implied-in-law conditions, and implied-in-law (or *quasi*) contracts. For example, what if the parties to a home purchase imply that time is of the essence, which is one of the most common "conditions"? What if buyer and seller both know that buyer cannot put her children in the local school unless she is the registered title holder by a certain date, but the parties fail to put a quick closing date in their agreement? May it not be implied, under the circumstances, especially if both parties were demonstrably aware of this? Assuming that the answer is yes, this would be an implied-in-fact *condition*, as distinguished from an implied-in-fact term (such as the duty to clean up debris and dust at the finish of a home remodeling project)? Failure by seller to timely close could prevent buyer's duty to purchase from arising. The parties' intent is key.

The following excerpt does not fully clarify the distinction between implied-in-fact contracts, implied-in-fact terms, or implied in fact conditions. However, the example that it uses about implying the duty to pay for services rendered would appear to be an implied-in-fact condition. The convoluted turns and twists that implied terms seem to take are perhaps explained by the fact that such questions reside within the somewhat murky overlap of law, equity, and public policy.

COMMERCE PARTNERSHIP 8098 LTD. PARTNERSHIP v. EQUITY CONTRACTING CO., INC.

District Court of Appeal of Florida, Fourth District, 1997

695 So. 2d 383

* * *

A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words. 17 Am.Jur.2d "Contracts" § 3 (1964); 1 Arthur Linton Corbin, Corbin on Contracts §§ 1.18–1.20 (Joseph M. Perillo ed. 1993). Where an agreement is arrived at by words, oral or written, the contract is said to be "express." 17 Am.Jur.2d "Contracts" at § 3. A contract implied in fact is not put into promissory words with sufficient clarity, so a fact

finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. Id.; 3 Corbin on Contracts § 562 (1960). It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact "rest upon the assent of the parties." *Policastro v. Myers*, 420 So.2d 324, 326 (Fla. 4th DCA 1982); *Tipper v. Great Lakes Chemical Co.*, 281 So.2d 10, 13 (Fla.1973). The supreme court described the mechanics of this process in *Bromer v. Florida Power & Light Co.*, 45 So.2d 658, 660 (Fla.1950):

[A] [c]ourt should determine and give to the alleged implied contract "the effect which the parties, as fair and reasonable men, presumably would have agreed upon if, having in mind the possibility of the situation which has arisen, they had contracted expressly thereto." 12 Am.Jur. 766.

See Mecier v. Broadfoot, 584 So.2d 159, 161 (Fla. 1st DCA 1991).

Common examples of contracts implied in fact are where a person performs services at another's request, or "where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances" fairly raising the presumption that the parties understood and intended that compensation was to be paid. *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19, 21 (1892); *Tipper*, 281 So.2d at 13. In these circumstances, the law implies the promise to pay a reasonable amount for the services. Lewis, 12 So. at 21; *Lamoureux v. Lamoureux*, 59 So.2d 9, 12 (Fla.1951); *A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996); *Dean v. Blank*, 267 So.2d 670 (Fla. 4th DCA 1972); *Solutec Corp. v. Young & Lawrence Assoc., Inc.*, 243 So.2d 605, 606 (Fla. 4th DCA 1971).

CMM Approach: The ability to recognize and to address clear distinctions is a critical skill for lawyers, but it is not always identified in the barrage of information that law students are expected to master. It may be helpful to undertake a small exercise at this point regarding implied contracts, terms and conditions. First, reflect on the differences between a contract, separate terms that may be within a contract, and conditions that may also be within a contract. Next, in the case of the potential need to imply something in a contractual setting, are you dealing with the actual existence of an agreement, or is it the addition of a term, or of a condition, within an existing contract? Further, ask whether there are facts and circumstances to suggest the existence of a contract, or the inclusion of a term, or of a condition, respectively (i.e., *implied in fact*). Finally, if inquiry gets this far, determine whether there is some law, rule of construction or public policy (i.e., *implied in law*). This will help to avoid confusion and facilitate that moment when "things just click." For an interesting discussion of classifying conditions, *see, e.g.,* Hugh E. Willis, *Promissory and Non-Promissory Conditions*, 16 INDIANA L. J. 349 (1941).

C. Implied-in-Law Conditions

Sometimes courts or even statutes make clear that contracts include certain terms or conditions as a matter of law, often based on public policy. For the sale of goods, the most famous implied-in-law condition (which may also be referred to as an implied-in-law *term*) is the duty of parties to act in good faith (note: rather than use the term "*term*" or "*condition*," the Code uses *obligation*). U.C.C. §1-304.[42] In the excerpt that follows, it is clear that Florida courts imply, as a matter of law, conditions such as that of acting in good faith. Chapter 18 addresses implied-in-law conditions more thoroughly.

PL LAKE WORTH CORP. v. 99CENT STUFF-PALM SPRINGS, LLC

District Court of Appeal of Florida, Fourth District, 2007

949 So. 2d 1199

KLEIN, J.

Appellant, the owner of a shopping center, leased space to the appellee, 99Cent, at a square foot rate which did not include common area expenses or real estate taxes for five years. It also gave 99Cent several options to renew for five years at a specified base rent, plus unspecified common area maintenance and taxes. Months before it came time to exercise the option, 99Cent asked the owner for, but was refused, information as to the estimated charges for maintenance and taxes. 99Cent ultimately exercised the option when it finally received the information, but this was after the time to exercise had expired. In this lawsuit the trial court found in favor of 99Cent, because the owner, in refusing to supply the information, had breached an implied duty of good faith. We affirm.

In 2000, when the five year lease was executed, the property was in distress, and 99Cent was able to negotiate a very favorable rate of six dollars a square foot with no common area maintenance or real estate taxes. The lease provided 99Cent with options to renew for three successive five year periods at a base rent of four dollars a square foot, plus unspecified common area maintenance and taxes. In order to exercise the option 99Cent was required to give written notice to the owner by November 2, 2005.

During the summer of 2005, 99Cent requested, on more than one occasion, information from the owner as to what the estimated maintenance expenses and real estate taxes would be in 2006. Although the owner initially said it would supply the information, it never did, and testified at trial that it refused

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to provide the estimated 2006 information because the lease did not require it to do so.

99Cent did not exercise the option by the deadline of November 2, 2005, because it had not yet received the information, and the owner filed this action seeking a declaratory judgment that the option had expired and that 99Cent was required to vacate as of April 30, 2006. 99Cent defended on the basis that the owner had breached an implied good faith duty to provide 99Cent with the information it needed in order to determine whether it should exercise the option. It sought declaratory and injunctive relief in order to obtain the information and have the opportunity to exercise the option. Within hours after the owner disclosed the maintenance and tax information pursuant to court order, 99Cent exercised its option to renew on February 3, 2006.

After a nonjury trial, the court found that the owner had breached an implied duty of good faith, when it refused to give 99Cent the information 99Cent needed in order to make an informed decision to exercise its option to renew. The court relied on *Sharp v. Williams,* 141 Fla. 1, 192 So. 476, 480 (1939):

> When a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing; and indeed if the situation is such that the cooperation of one party is an essential prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary cooperation....
>
> Prevention or hindrance by a party to a contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party, or the discharge of a duty by him, is a breach of contract. [citations omitted.]

The owner's argument is simply that, because the contract did not require the owner to furnish the information, there was no duty to do so. This argument of course ignores that there can be an implied duty to cooperate, which our supreme court recognized in *Sharp,* and which is explained more thoroughly by Judge Van Nortwick in his comprehensive opinion in *Cox v. CSX Intermodal, Inc.,* 732 So.2d 1092 (Fla. 1st DCA 1999).

An analogous situation was presented in *Bowers v. Medina,* 418 So.2d 1068 (Fla. 3d DCA 1982), in which a contract for the sale of a residence required the purchasers to obtain a mortgage loan for a specific amount. The owners, however, refused to make the property available for the appraisal, which was

necessary for the purchaser to obtain the loan commitment. The trial court found that the owners had breached a good faith duty of cooperation by refusing to permit the appraisal, and the third district affirmed stating:

> An established contract principle is that a party's good-faith cooperation is an implied condition precedent to performance of the contract; where that cooperation is withheld, the recalcitrant party is estopped from availing himself of his own wrong doing.

Id. at 1069.

The owner's argument that the implied covenant of good faith cannot be used to vary the express terms of a contract, *City of Riviera Beach v. John's Towing,* 691 So.2d 519 (Fla. 4th DCA 1997), is correct but misplaced in this case. If the lease had expressly provided that the owner was not responsible to furnish the information in dispute, the owner would have a point. In this case, however, the lease was silent, and the finding by the trial court that the owner had an implied duty to furnish this information, so that 99Cent could make an informed decision as to whether to exercise the option, is supported by the evidence and the law.

Affirmed.

STEVENSON, C.J., and SHAHOOD, J., concur.

Notes

12. A point made in *PL Lake Worth Corp*. deserves some attention. In that case, the owner of the shopping center argued that an implied duty, such as the implied duty to act in good faith, cannot be used to vary or eradicate express terms of a contract. (This point correlates to matters discussed in Chapter 14 Interpretation). Where there is a clear provision in a contract, such as a disclaimer of duty to furnish information to the other party, it is improper to nullify the disclaimer by subjecting it to an implied duty such as that of good faith. It is not that the law encourages contracting parties to utilize bad faith terms in contracts. Rather, there is the golden rule about freedom of contract, and risk attribution is part of the game. Thus, it is still possible for example to sell items “as is.”

13. We really could not make all of this up: creative lawyering, hard facts to reconcile, the blurring of lines between law and equity… it all goes into the mélange that is contracts law. Its conundrums, twists and turns make for a formidable mental challenge, as well as for the potential of a highly rewarding career. In addition to conditions that either prevent a duty from arising (*precedent*) or cut off a duty that has

arisen (*subsequent*), the law also recognizes *promissory conditions*. These are not on-and-off toggles, but more like dimmer switches that operate on a continuum. These act more like promises, where duties and rights are more relative, or flexible. In the case of a promissory condition, its failure *suspends* or *creates a right to enforce*, rather than *keeps off* or *turns off* the correlative duty. *Promissory conditions* will be addressed further in Chapter 18.

14. You may recall from Chapter 3 that the death or incapacity of either of the parties (the offeror or the offeree) terminates the power of acceptance in an offeree. From *Gunderson*, it is clear that the death of an employee prior to signing a settlement agreement, if it is not a condition precedent, does not nullify formation. Usually by state statute, personal representatives of decedents and incompetents may take legal steps to sign contracts, to enforce contracts, to honor existing obligations, etc. This poses some interesting questions on mutuality that are too esoteric to cover now.

15. For more on the elements of implied-in-law contracts, and for an interesting contrast to implied-in-fact contracts, *see Rite-Way Painting and Plastering, Inc. v. Tetor*, 582 So. 2d 15, 17 (Fla. App. 2d DCA 1991).

Problem 17-2

Using similar facts as set out in Problem 17-1, what if Sam had said, “1’ll sell you my book for half price after grades come in.” Though Sam failed the course, may Brooke force Sam to sell the book? In what way does this Problem differ from Problem 17-1?

3. Conditions Precedent, Subsequent, & Concurrent

A. Conditions Precedent

MAHLER v. ALLIED MARINE

District Court of Appeal of Florida, Third District, 1987

513 So. 2d 677

SCHWARTZ, Chief Judge.

According to the clear and unambiguous terms of an August 3, 1983, agreement for the purchase, pending sea trial, survey and inspection, of a $460,000 yacht, the appellant Mahler stood to lose his $20,000 deposit if he did not transmit a “[w]ritten or telex acceptance or rejection on or before August 10, 1983.” [Footnote omitted] It is well-settled that, in a transaction

like this, in which the prospective purchaser has the right to the use of the goods pending approval, and which is described as a "sale on approval," see §§ 672.326-.327, Fla.Stat. (1985), [Footnote omitted] the terms specifying the manner or time in which the purchaser must act are controlling. Thus, it is said in 3 R. Anderson, Uniform Commercial Code § 2-326:16 (3d ed. 1983),

> UCC § 2-326 and 2-327 regulate the transaction that becomes a sale when the buyer approves the goods. It is thus a conditional sale, the transferring of title that is essential to a sale being made dependent upon the satisfaction of the condition precedent of the buyer's approving.
>
> Such approval may be made expressly or by conduct that expresses approval or by conduct that is inconsistent with nonapproval and with the continued ownership of the goods by the seller.
>
> The approval may be manifested by the absence of any communication or conduct and the lapse of time. *If the contract states a time for approval, the expiration of that time constitutes an "approval."* If no time is stated in the contract, the lapse of a reasonable period of time has that effect. [e.s.]

See *George v. Davoli,* 91 Misc.2d 296, 397 N.Y.S.2d 895 (Geneva City Ct.1977) (specific time period for return of goods sold on sale or return basis enforceable even if less than "seasonable" under section 2-327 of the UCC); *Poole v. Smith's Car Sales (Balham), Ltd., [1962]* 2 All E.R. 482, 93 A.L.R.2d 333, 338 (1964) ("If the parties have fixed a time for the property to pass, then the property will pass at that time."); cf. Annot., Time for Return of Goods Sold on "Sale or Return" Absent Specific Time Provision in Contract, 93 A.L.R.2d 342 (1964). Since it is undisputed that Mahler did not, formally or otherwise, reject the vessel until September 18, 1983, well after the time provided, [footnote omitted] the application of this principle requires approval of the trial court's directing a verdict against him in this action for return of the deposit.

It should be noted that Mahler does not claim that the vessel did not conform to any applicable warranty or other requirement of the law of sales. See 3 R. Anderson, supra, § 2-326:15 ("The return contemplated by UCC § 2-326 is to be distinguished from the right of the buyer to reject nonconforming goods or to revoke acceptance and return nonconforming goods." [Footnotes omitted]). Instead he seeks to invoke only the terms of the written agreement itself. That attempt must founder upon the rocks of the immutable general rule that competent parties are held to the agreements into which they have freely, although perhaps unwisely, entered, *Home Development Co. v. Bursani,* 178 So.2d 113 (Fla.1965), and the particular ingredient of the rule that the failure

to comply with a contractual time requirement precludes the successful invocation of a right which is contingent upon its being followed. See *Homestead Properties v. Sanchoo,* 443 So.2d 442 (Fla. 3d DCA 1984); *Saul J. Morgan Enters. v. 57th Ave. Dev. Corp.,* 305 So.2d 18 (Fla. 3d DCA 1974), cert. denied, 314 So.2d 586 (Fla.1975); see also *National Health Laboratories, Inc. v. Bailmar, Inc.,* 444 So.2d 1078 (Fla. 3d DCA 1984), pet. for review denied, 453 So.2d 43 (Fla.1984); *Sun Bank v. Lester,* 404 So.2d 141 (Fla. 3d DCA 1981), pet. for review denied, 412 So.2d 467 (Fla.1982). There is no other error.

Affirmed.

Notes

6. Noteworthy is the fact that a party to the lawsuit in *Martin* did not have to turn over actual cash so long as he was "ready, willing, and able" to do so. This is a common requirement in Florida where a party to a lawsuit wishes to assert breach or failure on the part of the other. For another example, *see Hospital Mortg. Group* excerpted in Chapter 8, Section 3.

7. The Restatement (Second) Contracts does not use the terms *precedent, subsequent* or *concurrent*. However, the distinction between them, and therefore the likelihood of their continued use, are preserved in the provisions of § 225(1) (Effects of the Non-Occurrence of a Condition), and § 230(1) (Event that Terminates a Duty). *Compare* Restatement (First) Contracts §§ 250-251.

8. The distinction between the failure of a condition precedent and a breach of contract is that a failure of condition does not typically lead to any liability – neither party is required to perform until the condition is met. This notion underlies the law and practice of unilateral contracts. The beginning of performance may lead to an option contract to give the offeree time to complete the performance, *see* Chapter 7, but the failure to complete it would not lead to any liability for non-completion as would be the case had it been a bilateral contact with a mutual exchange of promises. *See, e.g.,* Restatement (First) Contracts § 257 Failure of a Condition to Exist or to Occur Distinguished from Breach of Promise.

B. Conditions Subsequent

SEITTER v. RIVERSIDE ACADEMY

Supreme Court of Florida, 1940

144 Fla. 69

PER CURIAM.

In part consideration for conducting their school in Hollywood, Florida, for three winter months each year, Riverside Academy, a Georgia school for boys, was to be deeded 50 acres of land near the proposed school site to be used for 'parade ground, military training field, amateur athletic, field, aviation ground and other kindred outdoor activities.'

Appellants, residents of Pennsylvania, were the owners of 160 acres of wild land near the proposed school site, and, being persuaded that the advent of the school into Hollywood would greatly enhance the value of their property, deeded 50 acres to Sandy Beaver, trustee of the school. The deed contained the following provision:

> 'This conveyance is made upon the condition that the aforesaid land to be used by the Grantee for a period of five (5) years, for parade ground, military training field, amateur athletic field, aviation ground and other kindred outdoor activities. It is also agreed that said Sandy Beaver, as Trustee for Riverside Academy, shall produce a receipted tax bill on or before April 1st of each year showing all taxes to be paid up to date. That the further agrees not to encumber said ground by reason of creating mortgage thereon, and also agrees that any street improvements made during said term are to be paid for by said Trustee of the Academy. In other words, should there be a breach of these covenants and conditions during said five (5) year period, this said fifty (50) acres is to be returned to the parties of the first part clear and free of all encumbrances, and title is to be as clear as at time of this conveyance.'

The deed, signed by appellants in Pennsylvania, was not witnessed.

Testimony was to the effect that the school entered upon the land and partially cleared it, but, on ascertaining that no witnesses signed the deed, abandoned their clearing operations. The land has been used for school purposes, however, being devoted to such activities as military camping grounds. Appellees have never made a demand of appellants for a corrective deed.

Appellants instituted this action in the equity court to have the deed cancelled, alleging it to be a cloud on their title. Counterclaim of appellees was to the effect that the deed was not witnessed, that an attempt had been made to carry out the conditions until it was found that appellees had no title, and prayed for a corrective deed. The lower court refused cancellation and the

final decree was to the effect that a new deed be given appellees, embodying the same provisions as the former invalid one.

It is contended by appellants that the deed, though insufficient to pass title to appellees, was a contract to convey subject to the conditions of the deed, and that the grantees having failed to fulfill the conditions were not entitled to a corrective deed. There was a contract to convey by reason of the invalid deed, but the contract to convey was not subject to the conditions; the conveyance, after it was made, would be subject to the conditions.

Conditions subsequent, as were the conditions here, do not exist until after an estate has come into being by reason of a conveyance. Mr. Thompson, in speaking of conditions with reference to estates in real property, says, in his work on Real Property:

> 'If the estate is to arise, or be enlarged upon the performance of the condition, then the condition is said to be precedent; if it is to terminate or be lost by the nonperformance of the condition, then it is called a condition subsequent. In other words, the condition is precedent when it must be performed before the estate can commence, and it is subsequent when it is to be performed after the estate has vested in the grantee. The former fixes the beginning, the latter the ending of the estate.' Vol. 3, page 47.

There are many other definitions of conditions subsequent, all of which state the same principle in different words. Some of them are:

> 'A condition subsequent of a contract is one which follows the performance of the contract * * *'. Northwestern Nat. Life Ins. Co. v. Ward, 56 Okl. 188, 155 P. 524, 526.

> 'Conditions subsequent are such as by the failure or nonperformance of which an estate already vested may be defeated.' 18 Corpus Juris 354.

It follows, therefore, that there can be no conditions subsequent until an estate has been created.

Appellants are attempting to benefit from their own default. Both parties are in a measure guilty of laches, eight years having passed since the deed was made, but in all fairness appellants should perform, or offer to perform, their part of the contract before default can be urged.

The decree of the circuit court requiring a deed to be given to appellees is affirmed.

Notes

(1) Worthy of consideration is the fact that the failure to fulfill a condition subsequent (remember that some may sue the term "breach of condition," but we recommend using "failure" for condition and "breach" for contractual duty) may suspend the non-breaching party's duties provided in a contract, but depending on the language used, it may also terminate such duty. For a case too long to include in this casebook, involving an insurance contract, *see State Farm Mut. Auto. Ins. Co. v. Curran*, 83 So.3d 793, 803-803 (Fla. 4th DCA 2011). The potential, simultaneous involvement of a contract interpretation would make for a very interesting fact pattern indeed.

(2) The *Seitter* excerpt raises the question of *laches*. This is an equitable doctrine cutting of the ability to exercise some contractual right for failure of timely exercising it. In short, it means, “you waited too long.” Were more coverage of this issue possible, it would be in Chapter 12 – Equitable Remedies.

Problem 17-3

Using similar facts as set out in Problem 17-1, what if Sam was going home for summer break, so he gave Brooke the Torts book right after his Torts exam and she promised to pay Sam when he returned from summer break. If Sam failed Torts and had to re-take the course, would he be entitled to the return of his Torts book (if he does not charge Brooke, of course)? If so, what legal theory would Sam be able to assert? In what way does this Problem differ from Problems 17-1 and 17-2?

C. Concurrent Conditions

MARTIN v. ALBEE

Supreme Court of Florida, 1927

93 Fla. 941

ELLIS, C. J.

This is an appeal from an order sustaining a demurrer to a bill in chancery for specific performance of a contract for the sale of land. The facts are sufficiently stated in the opinion.

It was alleged that Albee and Nash are copartners, engaged in the business of buying, selling, leasing, and otherwise dealing in real estate. The complainant

had an option to purchase from Albee and Nash certain property for the sum of $65,000. The agreement, which covered other matters, ran from its date, March 16, 1922, to January 1, 1925. It contained a clause that Martin should receive a commission of 5 per cent, on all property sold in the Albee & Nash subdivision. The bill alleges that Martin went into possession of the property upon which he subsequently acquired the option in January, 1922; that about September 10, 1924, he decided to 'exercise the option contained in the memorandum agreement.' He did so by telegraphing Mr. Albee that he exercised his option to purchase and by letter confirming the telegram. The telegram requested delivery of 'abstract to date, together with executed deed under instructions,' to the bank.

It is alleged that the property was partnership property, and was held and dealt with by Albee & Nash as such; that, after September 10th and before January 1, 1925, the complainant met Nash and orally notified him that he (Martin) had exercised his option to purchase, and that he was ready, willing, and able to carry out the agreement; that at all times since September 10, 1924, the complainant has been ready, willing, and able to carry out the option agreement and at various times has made demand upon the defendants that they carry out that part of the agreement by them to be performed, but they have failed and refused to do so; that at each demand the complainant 'tendered full performance upon his part except as those times when it was apparent from the terms of the refusal of the defendants that further tender of performance on his part was a useless and an idle ceremony.' The complainant offered to pay into court the money he was to have paid for the property.

It is alleged that the defendants have made a contract for the transfer of the property to Alfred Waldron. The bill prayed for an injunction to restrain the defendants from commencing and maintaining any actions against the complainant on account of his possession of the property which he held under the contract of sale, for specific performance, and an accounting from defendants of all commissions due under the agreement. The demurrer was general as to each of the grounds set forth as a basis of relief.

It was contended that the allegations were insufficient to support specific performance or an accounting or an injunction.

As to the accounting, we think the allegations of the bill are insufficient, but we do not agree with the chancellor as to his conclusions upon the right to a specific performance of the agreement and an injunction to restrain the defendants from annoying the complainant by litigation in relation to the property they agreed to sell to him. That the complainant's right to the relief prayed should be made to depend upon the presence in the bill of a direct, positive, affirmative allegation that the purchase price of the property, $65,000, was tendered to the defendants in specie or currency, legal tender of

the United States, prior to the 1st day of January, 1925, would seem to strip the court of chancery of the discretionary powers it exercises in these cases and restrict the equitable remedy within as narrow and unyielding limitations as could be imposed by an inflexible rule of law.

The relief prayed for in a suit for specific performance is largely within the discretion of the chancellor. It is not a matter of right solely, but it is subject to the circumstances of the transaction which may or may not move the conscience of the chancellor, which in all his decrees and orders must be colored or tempered by the rules of law which constitute his guide and compass. See Knox v. Spratt, 23 Fla. 64, 6 So. 924; Asia v. Hiser, 38 Fla. 71, 20 So. 796; Nobles v. L'Engle, 61 Fla. 696, 55 So. 839; Williams v. Bailey, 69 Fla. 225, 67 So. 877; Williams v. Neeld-Gordon Co., 86 Fla. 59, 97 So. 315; 25 R. C. L. 216.

The exercise of equity jurisdiction for the specific performance of contracts for the purchase of property is controlled by the provisions and principles of law and equity applicable to the particular facts and circumstances. See Dixie Navel Stores Co. v. German-American Lumber Co., 76 Fla. 339, 79 So. 836; Chabot v. Winter Park Co., 34 Fla. 258, 15 So. 756,43 Am. St. Rep. 192; Richardson v. Varn, 80 Fla. 517, 86 So. 503.

If the contract is definite as to terms and description of land, is mutual, supported by a consideration, and the vendee may not be amply compensated by damages at law for breach, and the contract is fair and reasonable in all its terms, he should not be denied the relief if he has complied with the requirements on his part to be performed or if the vendor has by his acts, declarations, or express waiver dispensed with such performance. See 25 R. C. L. 244-256; 24 Stand. Ency. Proc. 763.

The requirement of a tender of purchase money does not mean in all cases a tender strictly valid at law, but means a ‘present readiness, willingness, and ability in good faith to perform the acts required of one by the agreement, provided the other party will concurrently do the things which he is required by the contract to do, and notice by the former to the latter of such readiness, willingness, and ability.’ See Shouse v. Doane, 39 Fla. 95, text 108, 21 So. 807, 811.

The option which later merged into a contract was supported by a consideration. The letter containing the option, dated March 16, 1922, stated that—

> ‘In consideration of your valuable services in the past sixteen months and other considerations hereinafter mentioned, we propose and agree to retain you as our official architect for any

> and all building operations which we will be directly or indirectly interested in at or near Nokomis, Fla.'

After reciting what fees Martin should receive, the letter bound Martin to act as local correspondent to answer inquiries concerning the interests of Albee & Nash; that as additional compensation to Martin he was to have 5 per cent. on all property sold in the Albee & Nash subdivision; that he was to have a concession to operate a general store on the Albee boulevard, and as a further consideration Martin was given 'first option to purchase Pollyanna Inn and all buildings located on lots 1 and 2 in block 9 in Albee & Nash subdivision in Nokomis, Fla., for the sum $65,000.' The letter contains a clause as follows: 'Finally it is understood and agreed that this agreement will continue from this date until January 1, 1925.'

There were two paragraphs at the bottom of the letter below the signatures which were as follows:

> '(1) This agreement supersedes and nullified all agreements of prior date between both parties hereto.
> '(2) Noncompliance of this agreement by either party will allow the offended party the option to cancel this agreement.'

The agreement was sworn to by Martin on November 27, 1923, as to its execution by all parties.
There is nothing in the agreement in relation to any of its provisions as to time being of its essence. With reference to the option to purchase, the case was one of mutual and concurrent promises. The payment of money to Albee & Nash, and the conveyance by them to Martin, were to be simultaneous acts. The money was not to be paid before the deed conveying a good title was delivered, no more than that the deed was to be delivered before the money was to be paid. A tender of the performance of all conditions by Martin to be performed in that case does not mean the same thing as an offer to pay an ordinary debt due in money, where the creditor is entitled to receive it and nothing further is to be done and the transaction is completed and ended, but as said by the Supreme Court of Illinois in Clark v. Weis, 87 Ill. 438, 29 Am. Rep. 60, and referred to and quoted by this court in the opinion in Shouse v. Doane, supra:

> 'It only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness.'

See, also, Taylor v. Mathews, 53 Fla. 776, 44 So. 146.

Not only was the option supported by a past consideration consisting of valuable service rendered, but it was supported by a consideration daily contributed by Martin during the period of nearly 3 years during which it ran while he was in the service of the vendors. About 3 ½ months before the expiration date of the option to purchase, he decided to exercise his option and formally notified the parties by telegram and letter. The acceptance of the offer merged the option into a contract for the purchase of the property and constitutes such a contract as equity will enforce. See 25 R. C. L. 236; Rude v. Levy, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 Am. St. Rep. 123.

The bill is sufficiently clear against the demurrer that the defendants by their failure and refusal to comply with the agreement on their part abandoned, repudiated, and refused to perform the acts on their part which were concurrent with that which the complainant was to do, namely, pay the money. In the circumstances of this case, we are of the opinion that such conduct amounts to an excusal or waiver of tender of actual money, even if any was required under the agreement. 24 Stand. Ency. Proc. 763.

The order sustaining the demurrer to the third amended bill and dismissing the bill is reversed.

4. Common Express Conditions

A. Conditions of Satisfaction

Parties to an agreement may include conditions of satisfaction, which would prevent a duty from arising where he/she/it were not satisfied with the other party's performance. These may be objective or subjective. Objective criteria could for example be a list of specified technical criteria, such as weight tolerance for a new factory floor or the chemical composition of a drug or even a metal. Subjective criteria are significantly more problematic as they are based on personal and even aesthetic assessment. Often, in the case of the latter, courts will look for the exercise of a rejection using some form of good-faith standard. Worthy of note is that a completely subjective condition of satisfaction, not tempered by good faith or fair dealing, might constitute an illusory promise (addressed in Chapter 6). Technically, the U.C.C.'s § 2-601 *perfect tender rule*, FLA. STAT. § 672.601 (2017), is a condition of satisfaction, i.e., a buyer may reject a tender that "fails in any respect to conform to the contract." This would be subject to the exercise of good faith, as required by U.C.C. § 1-304, FLA. STAT. § 671.203 (2017). The cases that follow demonstrate some of the more common express conditions.

(1). Personal Satisfaction

RITCHEY & ASSOC., INC. v. EAGLE COMMUNITIES, INC.

District Court of Appeal of Florida, First District, 1988

531 So. 2d 366

WENTWORTH, Judge.

Appellant seeks review of an order denying its claim for damages in a breach of contract action. We conclude that the court erred by declining to find an actionable breach, and we therefore reverse the order appealed.

Appellant entered into an agreement with appellee to provide design services for a congregate living facility. The agreement identified the services to be provided, and specified appellant's compensation with a schedule of payments.

Performance under the agreement was conditioned upon appellee's authorization and acceptance of appellant's design proposal.

Appellee subsequently informed appellant that its services were no longer desired. This decision was made after a change in appellee's corporate officers, and was ostensibly based upon appellee's dissatisfaction with certain provisions in the parties' agreement. At the time the decision was made appellant had not yet made a formal presentation or received approval of a final design plan.

Appellant sought damages for appellee's termination of the agreement. A hearing was held and the court determined that the parties' agreement was intended to serve as a contract. However, the court noted that no standard was provided in the agreement regarding appellee's acceptance or rejection of appellant's design proposal. Concluding that appellee could accept or reject the proposal “at its option,” the court determined that appellant therefore cannot recover any damages.

Even though the parties' contract was executory, appellee's termination of the agreement may constitute an actionable breach subjecting it to liability for appellant's damages. *See Southern Crane Rentals v. City of Gainesville,* 429 So.2d 771 (Fla. 1st DCA 1983). The contract contains no express provision which would empower appellee to unilaterally terminate the agreement, and such a right should not be implied. *See generally, Southern Crane, supra.* While the contractual obligations are conditioned upon appellee's authorization and approval of appellant's design proposal, this is a requirement of personal satisfaction which must be exercised in good faith upon an honest evaluation of appellant's performance. *See Cartozian & Sons, Inc. v. Ostruske-Murphy, Inc.,* 64 Wash.2d 1, 390 P.2d 548 (1964); *see also, Hazen v. Cobb,* 96 Fla. 151, 117 So. 853 (1928). Appellee's termination of the parties' agreement was not based upon an honest dissatisfaction with

appellant's performance, and thus constitutes an actionable breach subjecting it to liability for damages.

The order appealed is reversed and the cause remanded.

SMITH, C.J., and WIGGINTON, J., concur.

(2). Commercial Satisfaction

HAZEN v. COBB

Supreme Court of Florida, Division A, 1928

96 Fla. 151

BROWN, J.

This is an action brought in both general and special assumpsit. The real object of the suit was to recover damages for breach of a special contract of employment, as we judge from what appears in the record and the briefs; that is, the salary and commissions appear to have been substantially paid up to the time of the discharge, but plaintiff claims a wrongful discharge long before the period fixed by his contract for employment had expired. On account of adverse rulings on the pleadings and evidence, plaintiff below, plaintiff in error here, introduced practically no testimony and suffered an instructed verdict in favor of defendants, taking writ of error to the judgment and assigning as error such adverse rulings.

The original declaration contained as its first three counts the common counts, for account stated, for work done, and materials furnished, and for money had and received. The fourth count declared on a special contract of employment for one year, a copy of what was attached to the declaration and made a part thereof. It was a contract between the plaintiff and Hazen and Cobb Motor Company for one year from date, by which the plaintiff was employed as a motortruck and tractor salesman at a stated monthly salary, and, in addition thereto, a certain commission on sales made. It contained this final clause:

> 'If party of first part should at any time deem party of the second part incapable of serving them in a profitable manner, they can, by paying up commissions to date, declare this contract null and void.'

The declaration alleged that at the time the contract was made the defendants, as partners, were engaged in the automobile business under the name of Cobb Motor Company; that plaintiff thereupon entered into the employment of the defendants according to the contract and kept and performed his contract in every respect, but that on a date named, about four

months later, ‘the defendants, without any provocation on the part of the plaintiff, did breach and break the said contract by discharging the plaintiff from their employment and forced the plaintiff to seek employment elsewhere, to the great damage and humiliation of the plaintiff, wherefore the plaintiff brings this his suit and claims $10,000 damages.’ A bill of particulars was attached.

The defendants demurred to the fourth count of the declaration upon the grounds that the contract was unilateral, without binding force, and made the duration thereof, and the term of plaintiff's employment depend upon the will and discretion of the plaintiff. The court sustained this demurrer, which ruling is assigned as error.

The contract is not unilateral, though it has been held that, where, by the contract, one party agrees to employ another as long as his services are ‘satisfactory,’ but the contract does not stipulate that the employee shall serve for any particular length of time, such contract lacks mutuality as to the duration of the employment, and the employer may terminate it any time. 18 R. C. L. 512; Price v. Western Loan Co., 35 Utah, 379, 100 P. 677,19 Ann. Cas. 589. See, also, S. F. & W. R. Co. v. Willett, 43 Fla. 311, 31 So. 246. However, where the contract of employment is for a definite term, if it provides that the services are to be performed to the *satisfaction of the employer*, it may be terminated by him at any time that he *in good faith* becomes dissatisfied with the service of the employee, though no real or substantial grounds for dissatisfaction exist. The employer is in such case the sole judge as to whether the services are satisfactory, and the courts will not substitute their judgment for his as to the reasonableness of the grounds of dissatisfaction. 18 R. C. L. 512; 39 C. J. 74, and cases cited; Allen v. Mutual Compress Co., 101 Ala. 574, 14 So. 362. But the general rule is that such dissatisfaction must be real and in good faith, not merely feigned, or capricious or mercenary. 18 R. C. L. 512; 39 C. J. 75. And it has been held that, where the contract may be terminated ‘for any good reason,’ the sufficiency of a reason for discharge is open to judicial inquiry. 39 C. J. 76; Caldwell v. Klyce, 80 Wash. 469, 141 P. 1042. A reservation of the right to discharge for reasons of the sufficiency of which the employer reserves the right to be the sole judge does not give the employer the right to terminate the contract without a reason or for a false reason. He must act in good faith. 39 C. J. 73, and cases cited.

The only ground stated in this contract which gave the employers the right to terminate it was that they should ‘*deem*’ the employee ‘incapable of serving them in a profitable manner.’ This did not mean that they might at any time arbitrarily discharge him without reason. The intent of the language used manifestly is that, if the employers should at any time conclude, upon any reasonable ground whatsoever, that the employee ‘was incapable of serving them in a profitable manner,’ they should have the right to terminate the contract, on ‘paying up commissions to date’; but the reason or reasons for

their conclusion must have had some relation to the question of the employee's capacity to serve them in a profitable manner, and they must have acted in good faith. If this much appeared, the court, or jury, would not attempt to substitute its judgment for that of the employer, as to the sufficiency of the reasons or grounds upon which they acted, even though erroneous; but, if the action of the employers was devoid of any reasonable basis whatever, it would not only be insufficient to sustain the breach, but would tend to show had faith.

So the stated grounds of the demurrer were not well founded. But it is suggested that the sustaining of the demurrer is not reversible error because said fourth count was bad for another reason, namely, that it did not sufficiently allege a breach of the contract, in that it did not negative discharge on the ground permitted under the contract, and hence did not state a good cause of action, so that the trial court should not be put in error for sustaining the demurrer, especially in view of the fact that leave to amend was granted. See 31 Cyc. 358.

* * *

Reversed.

B. Pay When/If Paid

INTERNATIONAL ENGINEERING SERVICES, INC. v. SCHERER CONSTRUCTION & ENGINEERING OF CENTRAL FLORIDA, LLC

District Court of Appeal of Florida, Fifth District, 2011

74 So. 3d 531

JACOBUS, J.

International Engineering Services, Inc. ("IES") timely appeals the entry of a final summary judgment in favor of Scherer Construction & Engineering ("Scherer") on its breach of contract claim. The lower court entered summary judgment in favor of Scherer based upon a pay-when-paid clause in the subcontract agreement between IES, the subcontractor, and Scherer, the general contractor. On appeal, IES contends that the pay-when-paid clause in the subcontract is ambiguous and, therefore, is not enforceable. It also contends that if the clause is found to be unambiguous, then it becomes ambiguous when considered in conjunction with the terms of the contract between Scherer and the project owner ("prime contract"). As a result of the ambiguities in the contract, IES argues that it was error for the trial court to enter summary judgment in favor of Scherer. We find, based upon the language contained in the subcontract and in the prime contract, the pay-when-paid clause is ambiguous and unenforceable. We therefore reverse the final summary judgment entered in favor of Scherer and remand the cause back to the trial court for entry of judgment in favor of IES.

In early 2008, IES and Scherer entered into a subcontract in which IES agreed to perform the structural steel work on a project in Maitland, Florida. IES performed all the work required under the parties' contract. After the work was finished, Scherer issued two written contract change orders, which increased the subcontract amount to $98,680. Although IES performed all the obligations under the subcontract, it did not receive payment from Scherer. IES then filed suit against Scherer alleging a breach of contract and seeking $98,680. In its answer, Scherer asserted a single affirmative defense: that the subcontract contains a pay-when-paid clause, which provides that payment by the project owner to Scherer is an express condition precedent to any obligation of Scherer to pay IES. Because Scherer had not been paid by the project owner, the condition precedent to Scherer's obligation to pay IES had not yet occurred and payment was not due.

Both parties filed motions for summary judgment. At the hearing on those motions, the trial court found that the language in the subcontract was not ambiguous and it was clearly meant to shift the burden of nonpayment from the contractor to IES, the subcontractor.

The pay-when-paid clauses in the contract between the parties are found in Articles 6 and 7 of the subcontract. Article 6 of the subcontract provides in part:

> 1. The Contractor shall pay the Subcontractor Progress Payments for work performed and material suitably stored and inventoried on the job-site (materials delivered to and stored at the site shall be limited to materials required to be incorporated into Subcontractor's work in the immediate future, taking into account any space restrictions at the job site) in monthly payments. Such payments are payable on or about the 20th of the following month. Subcontractor shall be responsible for proper storage and for any damage, defect, deficiency or theft or any materials stored on the project site, regardless of fault. Notwithstanding anything contained in any of the Contract Documents to the contrary, Subcontractor agrees that all progress payments and final payment to Subcontractor are contingent upon and subject to Owner's acceptance of Subcontractor's work and upon contractor's receipt of payment from Owner. Subcontractor agrees to accept the risk of non-payment if Contractor is not paid progress payments and/or final payment from Owner, for any reason. Subcontractor further agrees that Owner's payment to Contractor of all progress payments and final payment for any work performed by Subcontractor, other Subcontractors and Contractor shall be an express condition precedent to any obligation of Contractor to make any progress payment,

> retainages, or final payment to Subcontractor, and Subcontractor hereby waives all right to commence litigation or arbitration until payment is made to Contractor. Contractor, in its sole discretion, may make payment to Subcontractor by checks made payable jointly to Subcontractor and Subcontractor's sub-subcontractors, materialmen, laborers, and suppliers.

Article 7 states as follows:

> 1. Final Payment shall be due when the work described in this Subcontract is fully completed and performed in accordance with the Contract Documents, is satisfactory to the Owner and Architect, and Final Payment has been made by the Owner to the Contractor.

IES argues that these two clauses are ambiguous. In *Peacock Construction Co., v. Modern Air Conditioning, Inc.,* 353 So.2d 840 (Fla.1977), our supreme court addressed a situation similar to this case. It explained as follows:

> [The parties'] intent in most cases is that payment by the owner to the general contractor is not a condition precedent to the general contractor's duty to pay the subcontractors. This is because small subcontractors, who must have payment for their work in order to remain in business, will not ordinarily assume the risk of the owner's failure to pay the general contractor. And this is the reason for the majority view in this country, which we now join.
>
> Our decision to require judicial interpretation of ambiguous provisions for final payment in subcontracts in favor of subcontractors should not be regarded as anti-general contractor. It is simply a recognition that this is the fairest way to deal with the problem. **There is nothing in this opinion, however, to prevent parties to these contracts from shifting the risk of payment failure by the owner to the subcontractor. But in order to make such a shift the contract must unambiguously express that intention. And the burden of clear expression is on the general contractor.**

Id. at 842–43 (footnotes omitted) (emphasis supplied). If a risk-shifting provision is clear and unambiguous the court will interpret it as setting a condition precedent to the general contractor's obligation to pay. *DEC Elec., Inc. v. Raphael Constr. Corp.,* 558 So.2d 427, 429 (Fla.1990). If, however, the provision is ambiguous, a court will interpret it as fixing a reasonable time for the general contractor to pay. *Id.*

Article 6 is a clear expression that the parties intended for IES to assume the risk of loss for nonpayment. IES argues that Article 7 is ambiguous because it is very similar to the language found in *Peacock.* If Article 7 was the only expression in the contract regarding payment, then IES's argument would be well-taken, *Peacock* would apply, and IES would be entitled to payment in a reasonable time. However, when Articles 6 and 7 are read together, it is apparent that the parties expressly and unambiguously intended to shift the risk of nonpayment to IES for progress payments and final payments.

This finding, however, does not end our inquiry. Article 2 of the subcontract between the parties is relevant to the arguments on appeal. It reads as follows:

> The "Contract Documents" for this Subcontract consist of this Agreement, the terms, conditions or instructions contained in the transmittal letter from the Contractor to the Subcontractor delivering this subcontract for execution by the Subcontractor, any exhibits attached hereto, the Agreement between the Owner and Contractor dated (prime contract), the conditions of the Architect, all approved drawings and architectural plans and specifications, all modifications issued prior to execution of the Agreement between the Owner and Contractor, and all modifications issued subsequent thereto.

Article 2 of the subcontract clearly incorporates the prime contract by reference. The prime contract provides:

> Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied.

This term in the prime contract provides that the owner is not obligated to pay Scherer until Scherer has paid all its subcontractors. By incorporating the prime contract into the subcontract, the pay-when-paid clause becomes ambiguous.

This situation is analogous to that found in *OBS Co. v. Pace Construction Corp.,* 558 So.2d 404 (Fla.1990). In that case, the subcontract contained a clear pay-when-paid clause. *Id.* at 406. The subcontract incorporated by reference the contract between the general contractor and the owner. *Id.* The court concluded that this created an ambiguity regarding who should bear the risk of the owner's nonpayment. *Id.* The *OBS* court emphasized that "in

construing risk-shifting provisions, the burden of clear and unequivocal expression is on the general contractor." *Id.* Therefore, the court held that Pace, the general contractor, remained liable for the final payment it owed to OBS, the subcontractor. *Id.* at 407; *see also Harris Air Sys., Inc. v. Gentrac, Inc.,* 578 So.2d 879, 882 (Fla. 1st DCA 1991) (holding that final payment provisions of general contract and subcontract conflicted and created ambiguity regarding when subcontractor was entitled to payment by general contractor, ambiguity must be resolved against general contractor).

Here, an ambiguity exists when the pay-when-paid clause is read in combination with the prime contract and its conditions. This ambiguity must be resolved against Scherer, the general contractor, and interpreted as establishing a reasonable time for Scherer to pay IES. *See OBS,* 558 So.2d at 407; *Gentrac,* 578 So.2d at 882.

We have considered the parties' remaining arguments and find them to be without merit. The final judgment is reversed and the matter is remanded to the trial court for entry of a judgment in favor of IES.

REVERSED and REMANDED for JUDGMENT in favor of International Engineering Services, Inc.

ORFINGER, C.J. and TORPY, J., concur.

C. Time is of the Essence

ARVILLA MOTEL, INC. v. SHRIVER

District Court of Appeal of Florida, Second District, 2004

889 So. 2d 887

VILLANTI, Judge.

Arvilla Motel, Inc. (Arvilla), challenges a final judgment that required it to specifically perform on a contract to sell the Arvilla Motel, valued at over 1.5 million dollars, to Stewart Shriver. The dispute between Arvilla and Shriver centers around the closing date and a "time is of the essence" clause. The trial court found that the "time is of the essence" clause was either waived or modified and Shriver did not breach the contract by failing to timely close. We disagree and therefore reverse the trial court's order granting specific performance.

* * *

A “time is of the essence” clause is not necessarily a “stock phrase.” *Rybovich Boat Works, Inc. v. Atkins,* 587 So.2d 519, 521 (Fla. 4th DCA 1991). Where it clearly appears from the contract that time is essential, courts will recognize the parties' expressed intention. *Id.* However, this court warned against trying to “achieve this result by merely putting into the contract the words ‘time is of the essence of this contract.’ ” *Jackson v. Holmes,* 307 So.2d 470, 472 (Fla. 2d DCA 1975) (quoting 3A Corbin, *Contracts* § 715 (1960)). “[T]o give effect to such a cryptic provision, [the court must know]: What performance at what time is a condition of which party's duty to do what?” *Id.* at 472(quoting 3A Corbin, *Contracts* § 715). We also quoted Corbin's advice not to apply a general provision that time is of the essence to all of the many “promises for sundry performance, varying in amount and importance,” because parties often insert the provision in the contract without any realization of its significance. *Id.* “In short, a ‘time is of the essence’ provision will be given effect in an equitable proceeding [provided] it is shown to be clearly applicable to the contract requirement against which it is sought to be applied.” *Id.* (refusing to apply a “time is of the essence” clause contained within a paragraph concerning the ultimate closing to a provision concerning bank loan certification).

In Arvilla's case, there was an express “time is of the essence” clause in the contract between Arvilla and Shriver. The first page of the contract plainly states in bold letters, “Time is of the essence in this Contract.” While this clause was contained in a standard printed form, the parties clearly intended it to apply to the closing date. It is contained under the heading “PURCHASE AND SALE,” apparently referring to ultimate sale of the motel. *Jackson* warns against finding a general “time is of the essence” provision applicable to all of the many promises for sundry performance. Here, Casimir and Shriver specifically agreed in an addendum to move the closing date to over a month earlier than specified in the contract-the closing date was singled out as being significant. There was an expressed “time is of the essence” clause in the contract, and the addendum, which referenced the contract, specifically addressed an earlier closing date, signifying that it was the intention of the parties to close on August 26.

Because the record reflects that the parties clearly intended to make time essential as to the closing date, we conclude that Arvilla had “an immediate right to cancel the contract if the [buyer was] unable to timely demonstrate an ability” to perform. *See Garcia v. Alfonso,*490 So.2d 130, 131 (Fla. 3d DCA 1986). Arvilla, the nondefaulting party, was not required to grant an extension of time for the closing and was within its rights to declare forfeiture after Shriver made no attempt to close on August 26. [Citation omitted]

* * *

Reversed.

4. Legislative Alteration of the (Implied) Duty of Good Faith

We have seen that contracts include, either as a condition or as a promise, the implied duty of good faith. The application of this duty is not necessarily without limitation, however.

QBE INS. CORP. v. CHALFONTE CONDOMINIUM APARTMENT ASSOC., INC.

Supreme Court of Florida, 2012

94 So. 3d 541

* * *

ANALYSIS

This Court has recounted the evolution of insurance contract litigation in Florida in a number of its previous cases. *See, e.g., Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1125–1129 (Fla.2005); *Talat Enters., Inc. v. Aetna Cas. & Sur. Co.,* 753 So.2d 1278, 1281 (Fla.2000*); State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 58–59 (Fla.1995). Until the twentieth century, actions for breaches of insurance contracts were treated the same as any other breach of contract action. *Laforet*, 658 So.2d at 58. However, as insurance took on a larger institutional role and liability policies began to replace traditional indemnity polices as the standard policy form, insurance contracts began to be seen as distinguishable from other types of contracts. *Id*. Under the liability policies, insurance companies took on the obligation of defending the insured and the power to settle or refuse to settle a claim. *Id*. In light of this, courts began to recognize that insurers owed a duty to their insureds to refrain from acting solely in the insurers' own interests in settlement. *Id*. "This concern gave life to the concept that insurance companies had an obligation of good faith and fair dealing." *Ruiz*, 899 So.2d at 1125; *see also Laforet*, 658 So.2d at 58 ("This duty became known as the 'exercise of good faith' or the 'avoidance of bad faith.' ").

For many years, Florida courts imposed an independent duty on liability insurers to act in good faith when defending insureds against third-party claims, *see, e.g., Butchikas v. Travelers Indem. Co.*, 343 So.2d 816, 817–18 (Fla.1976), and recognized a common law cause of action for bad faith within the context of third-party actions. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783, 785 (Fla.1980). In fact, Florida common law recognized third-party bad-faith actions involving insurance as early as 1938. *See Auto Mut. Indem. Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938). These third-party bad-faith actions involved a claim "in which an insured sues his liability insurance

company for bad faith in failing to settle a claim which ultimately results in a third-party judgment against him in excess of the policy limits." *Time Ins. Co. v. Burger*, 712 So.2d 389, 391 (Fla.1998). Even though the bad faith occurred between an insurer and its insured, Florida courts have also allowed the injured third party to bring a bad-faith action directly against the first party's insurer without an assignment of the cause of action by the insured first party. *See Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259 (Fla.1971).

However, at the time, no analogous bad-faith action existed for first-party claimants [footnote omitted] in Florida common law. *Ruiz*, 899 So.2d at 1125; *Laforet*, 658 So.2d at 59. Florida was among a number of states upholding a distinction between the duty owed to first- and third-party claimants, with insurers owing no fiduciary duty in first-party claims because their legal relationship was that of "debtor and creditor." *Baxter v. Royal Indem. Co.*, 285 So.2d 652, 657 (Fla. 1st DCA 1973).

In 1982, the Legislature enacted section 624.155 of the Florida Statutes, the so-called "Bad Faith Statute." See ch. 82–243, § 9, Laws of Fla. This statute was "designed and intended to provide a civil remedy for any person damaged by an insurer's conduct." Ruiz, 899 So.2d at 1124. Section 624.155(1)(b) 1, Florida Statutes (2009), provides:

> (1) Any person may bring a civil action against an insurer when such person is damaged:
> ....
> (b) By the commission of any of the following acts by the insurer:
>
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests....

Thus, section 624.155(1)(b)1 created a statutory first-party bad-faith cause of action and codified prior decisions authorizing a third party to bring a bad-faith action under the common law. *Talat*, 753 So.2d at 1283 ("[T]he civil remedy provided in subdivision (1)(b)1 was not in existence for first-party insureds before the adoption of the civil remedy statute."); *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So.2d 275, 277 (Fla.1997) (concluding that the statute "authorizes a third party to file a bad-faith claim directly against the liability insurer without an assignment by the insured upon obtaining a judgment in excess of the policy limits"); *Macola v. Gov't Emps. Ins. Co.*, 953 So.2d 451, 456 (Fla.2006) (explaining that statute also codified the Court's prior decisions authorizing a third party to bring a bad-faith action under the common law). "Therefore, the same obligations of good faith that existed for

insurers dealing with their insureds in the third-party context were extended by statute to the first-party context." *Macola*, 953 So.2d at 456.

Since the statute's enactment, both federal and Florida courts have found that section 624.155 extends bad-faith actions to the first-party context. *See, e.g., Jones v. Continental Ins. Co.*, 920 F.2d 847, 849 (11th Cir.1991) (citing a number of cases in which the courts have reached this conclusion); *Porcelli v. OneBeacon Ins. Co.*, 635 F.Supp.2d 1312, 1316 (M.D.Fla.2008); *Laforet*, 658 So.2d at 58–59; *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263, 265–66 (Fla. 5th DCA 1987); *see also United Guar. Residential Ins. Co. of Iowa v. Alliance Mortg. Co.*, 644 F.Supp. 339, 341 (M.D.Fla.1986) ("The language of section 624.155 indicates that the overall purpose of the legislature was to impose civil liability on insurers who act inequitably vis-a-vis their insureds, not simply to restate or clarify the common law.").

Relevant legislative history also supports the conclusion that there was no first-party bad-faith action prior to the enactment of section 624.155. A 1982 Staff Report to the House Committee on Insurance states that section 624.155 "requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in insured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies." Fla. H.R. Comm. on Ins., HB 4–F(1982), Staff Analysis 12 (June 3, 1982) (on file with Florida State Archives). "This language indicates the Legislature recognized that prior to this statute, case law did not permit first parties, such as those covered under uninsured motorists policies, to sue their insurance companies for bad faith refusal to pay claims." *Rowland v. Safeco Ins. Co. of America*, 634 F.Supp. 613, 615 (M.D.Fla.1986).

Based on this case law and legislative history, it is clear that there is no common law first-party bad-faith action in Florida. However, Chalfonte asserts that its claim for a violation of the implied contractual warranty of good faith and fair dealing is not the same as a bad-faith claim by a first party. Chalfonte cites a number of federal cases in which the courts have recognized a separate common law claim for breach of the implied warranty of good faith and fair dealing. *See, e.g., Townhouses of Highland Beach Condo. Ass'n v. QBE Ins. Corp.*, 504 F.Supp.2d 1307, 1311 (S.D.Fla.2007) (explaining that this action "relates to the express contractual provision breached and does not contemplate the parties' wrongful conduct, only whether a contractual term was breached and whether the parties' reasonable contractual expectations have been thwarted"). Chalfonte also relies on the Third District Court of Appeal's decision in *O'Shields v. United Automobile Insurance Co.*, 790 So.2d 570 (Fla. 3d DCA 2001), which is cited by the Eleventh Circuit in the instant case as "implicitly recogniz[ing] that a good faith and fair dealing claim can be distinct from a statutory bad faith claim in a first-party action on an insurance contract." *Chalfonte*, 561 F.3d at 1272.

In fact, other federal courts have disagreed and have determined that a breach of the implied covenant of good faith and fair dealing does not exist as a separate claim from a statutory bad-faith claim in first-party insurance claims in Florida. *See Portofino South Condo. Ass'n v. QBE Ins. Corp.*, 664 F.Supp.2d 1265 (S.D.Fla.2009) (concluding that under Florida law a cause of action for breach of the implied warranty of good faith and fair dealing is subsumed in a bad-faith action pursuant to section 624.155); *Nirvana Condo. Ass'n v. QBE Ins. Corp.*, 589 F.Supp.2d 1336, 1342 (S.D.Fla.2008) (dismissing a contractual claim for breach of implied warranty of good faith and fair dealing "as a matter of law" because the insured's "relief for the unreasonable or untimely payment of its claim is limited to a section 624.155 action that does not ripen until [the coverage] litigation is concluded"); *QBE Ins. Corp. v. Dome Condo. Ass'n*, 577 F.Supp.2d 1256, 1261 (S.D.Fla.2008) (dismissing a claim for breach of the implied covenant of good faith and fair dealing because "no such cause of action exists under Florida law"); *cf. Trief v. Am. Gen. Life Ins. Co.*, 444 F.Supp.2d 1268, 1270 (S.D.Fla.2006) (describing plaintiff's allegations regarding insurer's failure to adjust, investigate, and pay claim as "resembl[ing] a claim for statutory bad faith rather than one for breach of implied obligation of good faith" and dismissing it as premature until the underlying coverage dispute was determined). Further, as the Eleventh Circuit noted, the plaintiff in *O'Shields* "did not sue his insurer for failure to investigate and assess his claim within a reasonable time, but rather for failure to provide information relating to the settlement of his claim," which was an express term of the insurance contract. *Chalfonte*, 561 F.3d at 1272. One Florida court has at least implicitly recognized that section 624.155 constituted a change in the law regarding first-party claims based on an insurance company's bad-faith refusal to settle or pay claims. *See Indus. Fire & Cas. Ins. Co. v. Romer*, 432 So.2d 66, 67 n. 2 (Fla. 4th DCA 1983).

In most cases, federal courts that have dismissed breach of the implied warranty of good faith claims have concluded that no such cause of action exists in Florida. *See Nirvana*, 589 F.Supp.2d at 1340–42; *Dome*, 577 F.Supp.2d at 1260–61. Those federal courts that have not dismissed the implied warranty claims have relied on the general proposition that "[u]nder Florida law, the covenant of good faith and fair dealing is implied in every contract, requiring the parties to follow standards of good faith and fair dealing designed to protect the parties' reasonable contractual expectations." *Townhouses of Highland Beach*, 504 F.Supp.2d at 1310. *But see Portofino*, 664 F.Supp.2d at 1269 (concluding that federal cases that found a claim for breach of implied warranty of good faith and fair dealing to be separate and distinct from a cause of action for first-party bad faith had "incorrectly applied Florida law").

Florida contract law does recognize an implied covenant of good faith and fair dealing in every contract. *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315

(11th Cir.1999*); Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1438 (S.D.Fla.1996); *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So.2d 1049, 1050 (Fla.1997*); Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So.2d 1232, 1234–35 (Fla. 4th DCA 2001). This covenant is intended to protect "the reasonable expectations of the contracting parties in light of their express agreement." *Barnes*, 932 F.Supp. at 1438. However, there are two limitations on such claims: (1) where application of the covenant would contravene the express terms of the agreement; and (2) where there is no accompanying action for breach of an express term of the agreement. Ins. *Concepts*, 785 So.2d at 1234. A duty of good faith must "relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements." *Id.* (*quoting Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So.2d 573, 575 (Fla. 4th DCA 1998)).

Despite this broad language, Florida courts have not found that this implied covenant creates a separate first-party action against an insurance company based on its bad-faith refusal to pay a claim. *See, e.g., Romer*, 432 So.2d at 67 ("Bad faith refusal to pay gives rise to a cause of action only if the facts involving the bad faith refusal amount to an independent tort such as fraud or intentional infliction of emotional distress.").

In fact, this Court has repeatedly described the statutory bad-faith action with reference to the duty of good faith and fair dealing. *See Ruiz*, 899 So.2d at 1126 (explaining that the statutory remedy in section 624.155 "essentially extended the duty of an insurer to act in good faith and deal fairly in those instances where an insured seeks first-party coverage or benefits under a policy of insurance") (emphasis added); *Laforet*, 658 So.2d at 59 ("Through this statute, the Legislature created a first-party bad faith cause of action by an insured against the insured's uninsured or underinsured motorist carrier, thus extending the duty of an insurer to act in good faith to those types of actions.") (emphasis added). Further, in discussing the legislative intent behind the enactment of section 624.155, this Court has repeatedly referred to the duty to act in good faith and to deal fairly. *Ruiz*, 899 So.2d at 1127 ("The Legislature has mandated that insurance companies act in good faith and deal fairly with insureds regardless of the nature of the claim presented, whether it be a first-party claim or one arising from a claim against an insured by a third party.") (emphasis added); *Id.* at 1128 ("The Legislature has clearly chosen to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have had in dealing with third-party claims.") (emphasis added). Similarly, one federal court has described "good faith" and "bad faith" as "two sides of the same coin." *Continental Cas. Co. v. City of Jacksonville*, 550 F.Supp.2d 1312, 1337 (M.D.Fla.2007), *aff'd,* 283 Fed.Appx. 686 (11th Cir.2008). "Put differently, the absence of 'good faith' constitutes 'bad faith,'

and qualitative descriptions of ‘good faith’ conduct are often compared to qualitative descriptions of ‘bad faith’ conduct composed of terms that are simply the antonyms of terms used to describe ‘good faith.’ ” *Id*.

Federal courts have interpreted this Court's various decisions as evidence that there is no common law action for breach of the implied warranty of good faith and fair dealing in the first-party coverage context and the only remedy available is the statutory bad-faith action created by section 624.155. *Nirvana*, 589 F.Supp.2d at 1342 (“[A]s the Florida Supreme Court has repeatedly made clear, no theory of liability was ever available to an insured against the insurer until 1982. That clearly includes a contractual theory of liability based on the implied covenant or warranty of good faith and fair dealing.”); *Dome*, 577 F.Supp.2d at 1261 (stating that a claim for breach of the implied covenant of good faith and fair dealing did not exist prior to the passage of section 624.155).

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 17

1. Differences in creation and operation of conditions precedent, subsequent, and concurrent
2. Conditional sales
3. Different forms of satisfaction, objective, and subjective tests

SUGGESTED EXERCISE(S)

(a) Using a state case law database (electronic or otherwise), look up “conditions” and identify two or three more conditions that are recognized by the courts of the state in order to develop a sense of how many varieties of condition there can be.

CHAPTER 18: IMPLIED IN LAW CONDITIONS & SUBSTANTIAL PERFORMANCE

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There are several overlapping concepts from other Chapters that should seem familiar. First, there is the concept of *gap-filling* and of *flexibility* addressed in Sections 2 and 3 of Chapter 4. There is also the concept of *interpretation* covered in Chapter 13. Moreover, these supplement Chapters 16 and 17 on conditions, with these being the last form of three: *express*, *implied-in-fact*, and now, *implied-in-law*. Technically speaking, this order would actually be the one that drives analysis of conditions. This is evidenced by the fact that cases indicate that *implied conditions* cannot supplant the requirements of express conditions. Finally, you may get a feeling that *equity* ties into this area of law, i.e., it sometimes seems that courts imply conditions that are not expressly stated in a way to keep things fair.

First, this Chapter describes some of the common examples of situations where courts imply conditions, often for public policy or overall fairness reasons. For example, there is an implied duty of good faith in all contracts, whether they be common law types or involve the sale of goods. Quite important are two common limitations on when courts may imply the duty of good faith and fair dealing set out in the *Insurance Concepts and Design, Inc.* case. For the latter, this duty is actually codified by the state's adoption of Article 2 of the Uniform Commercial Code. The last case excerpt in Section 1 involves Florida's sale-of-goods *good faith* implied duty. It should be noted that the U.C.C. and the state statutes that adopt it include in some factual situations additional implied duties such as *fair dealing* or the application of *reasonable commercial standards*. Another example would be the implication of fiduciary duties in contracts involving special relationships where the parties have not carefully delineated the rights and duties between them. Fiduciary duties are a main focus of agency law, and their inclusion in contractual relationships is often implied either by courts or imposed by statute. Additionally, state statutes often provide for consumer protections, which find their way into court pronouncements. A good example of this kind is in the situation of regulated service providers and common carriers. This would include cases involving railroads, privately operated "public" services including those for telephone and electricity, and other public services such as water treatment.

Afterward, we address the doctrine of *substantial performance*. Connection to issues of interpretation and construction (addressed in Chapter 13) should be emphasized. Technically, interpreting a possible condition as a *covenant* or *promise* is not an exercise of implying a condition in law. Rather, it is the interpretation of some express term, usually as a way to avoid the kind of forfeiture of contractual rights that conditions permit.

CCM Approach: The distinction between a failure of condition and a breach of contractual obligation should now be somewhat familiar. This has been said before, but drafters should be very clear on which of these two their

client expects and to phrase them very carefully. At this juncture, it may prove helpful to set out rules, both common law and for sale-of-goods transactions, which cover the most famous of implied-in-law contractual conditions.

Restatement (Second) of Contracts § 205 (1981)

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

The Uniform Commercial Code (and state adoptions of it) include duties of good faith and fair dealing in several places, the primary one being in Article 1:

§ 1-304. Obligation of Good Faith

Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.[43]

§ 1 – 201. General Definitions and Principles of Interpretation

(20) "Good faith," [ ] means honesty in fact and the observance of reasonable commercial standards of fair dealing.[44]

38. Implied in Law Conditions

A. Common Law

(1). Common Situations of Implied Duty

WHITE v. SYFRETT

District Court of Appeal of Florida, First District, 2006.

955 So. 2d 1110

KAHN, J.

In this breach of contract case, the trial court dismissed appellants' amended complaint with prejudice. Because the trial court erred by dismissal at such an early stage, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

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Appellants, Danny K. White and Laura Michelle White, filed a complaint for damages, alleging breach of contract, against appellee, Troy Syfrett, concerning the purchase and sale of certain real estate. Syfrett moved to dismiss the complaint, asserting that because it lacked allegations that the Whites complied with all conditions precedent, it failed to state a cause of action. The circuit court dismissed the complaint without prejudice on September 2, 2005.

On September 20, 2005, the Whites filed an amended complaint, again alleging breach of contract. The Whites alleged that, on August 23, 2002, they had entered into a contract with Syfrett for the purchase and sale of certain real estate in Bay County and they attached a copy of the contract as Exhibit A. The Whites further alleged:

> 3. Pursuant to the terms of the contract, the Plaintiffs and the Defendant agreed to the property to be conveyed based upon an aerial diagram which was drawn to scale. The Plaintiffs reserved the right to approve the actual survey once it was completed to ensure that it conformed to the aerial diagram approved by both parties.

The Whites alleged that, on September 23, 2004, they received a letter returning their $30,000 deposit and advising that Syfrett had decided not to develop the property. The Whites advised Syfrett that they were not accepting return of the deposit and were looking for Syfrett to perform under the terms of the contract. The Whites alleged that Syfrett subsequently "caused the subject property together with surrounding parcels to be sold to a third party thereby depriving the Plaintiffs of the right to acquire the property from the Defendant."

* * *

Moreover, with reference to the so-called "agreement to agree" issue, we do not know whether Syfrett performed or breached this provision. We note, in this regard, that "every contract includes an implied covenant that the parties will perform in good faith." *Champagne–Webber, Inc. v. City of Fort Lauderdale*, 519 So.2d 696, 697 (Fla. 4th DCA 1988); *see also, e.g., Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097–98 (Fla. 1st DCA 1999) ("One of the implied contract terms recognized ... in Florida law ... is the implied covenant of good faith, fair dealing, and commercial reasonableness. This implied covenant arises because '[a] contract is an agreement whereby each party promises to perform their part of the bargain in good faith, and expects the other party to do the same.' Thus, the implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations.... Thus, where the terms of the contract afford a party

substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party." (citations omitted)); *Fernandez v. Vazquez*, 397 So.2d 1171, 1174 (Fla. 3d DCA 1981) ("One established contract principle is that a party's good faith cooperation is an implied condition precedent to performance of a contract. Where that cooperation is unreasonably withheld, the recalcitrant party is estopped from availing herself of her own wrongdoing.").

Further, under the case law presented by the parties, if Syfrett drafted the contract here, then Syfrett may be estopped to assert that the contract is unenforceable. *See Bajrangi*, 589 So.2d at 420 (finding lessor "estopped to assert that the lease is unenforceable because of the description contained therein" because lessor "chose the description for its own purpose and its attorneys prepared the lease" and lessor "accepted payments for almost two years (until after the purchase price for the sale of the store was completely paid) before raising the description as a defense to the exercise of the option"). This serves as yet another reason why the trial court should not have granted the motion to dismiss.

* * *

CONCLUSION

Because the Whites sufficiently stated a cause of action for breach of contract, the trial court erred in going beyond the four corners of the complaint and resolving the case at the motion to dismiss stage. *See, e.g., Magnum Capital*, 905 So.2d at 221; *Bell*, 778 So.2d at 1032. Accordingly, we REVERSE the order on appeal and REMAND this case for further proceedings.

BROWNING, C.J., concurs; DAVIS, J., dissents with opinion.

DAVIS, J., dissenting.

Because 1 agree with the trial court that the property description is patently ambiguous, 1 respectfully dissent and would affirm.

CASALE v. CARRIGAN AND BOLAND, INC.

District Court of Appeal of Florida, Fourth District, 1974

288 So. 2d 299

WALDEN, Judge.

A real estate salesman claimed to have been wrongfully deprived of his earned real estate commission. His suit for damages was ended by a directed verdict against him during the course of a jury trial. We reverse the ensuing judgment and remand for a full trial in order that he might have his day in court and have a fair opportunity to have a jury assess his entitlement to the fruit of his labor.

To set the stage, the plaintiff was a real estate salesman. He was employed by the defendant, a real estate brokerage firm named Carrigan and Boland, Inc. The defendant wore two hats and this is important. It was the broker and, most importantly, it was also the owner of the land which was sold. This sale of defendant's land was the basis of the saleman's claim for commission.

The facts are not in dispute. As is well known, we are obliged to resolve all inferences in favor of the plaintiff here and view the evidence in the light most favorable to him. 2 Fla.Jur., Appeals, s 302. Further, this is the criteria which should have been employed by the trial court in considering the motion for directed verdict. *Seaboard v. Big Chief*, Fla.App.1968, 211 So.2d 21; *Vertommen v. Williams*, Fla.App.1973, 287 So.2d 116. Opinion issued December 14, 1973.

Plaintiff had been employed by the defendant for several years and operated the defendant's branch real estate office. The prospect and ultimate purchaser of the land, Mr. Lynch, made the initial contact with the branch office by telephone and thereafter came to that office and met plaintiff. At that time the plaintiff took Mr. Lynch to the property in question and showed it ot him. Plaintiff generally discussed the property with Lynch and projected the purchase price. Plaintiff prepared a map of the property for Lynch and discussed the matter of rental property yields of like nearby property. Lynch then indicated to plaintiff that he was interested and wanted to purchase. Plaintiff prepared and submitted a written contract of purchase to Lynch. The contract was not then executed only because Lynch wanted his attorney to first review its terms.

With the above, plaintiff telephoned defendant at defendant's main office and advised that the property was being sold and requested that it be taken off the market. Per defendant's custom, the request was approved and the property was reserved.

All this was in early November 1969, and on November 6th plaintiff visited defendant's main office and defendant, via its representative, Mr. Carrigan. The defendant was then advised again of the fact that plaintiff had a buyer for

the property, Mr. Lynch. The possibility of subordination was discussed with defendant and this conversation was duly reported to Lynch by plaintiff.

Again on November 11th, plaintiff and the defendant (through Mr. Carrigan) discussed subordination so that the purchaser, Lynch, might get started with his construction project. On one or two more occasions before December 4th, plaintiff conferred with Lynch about closing the deal.
And now comes the problem. In mid December plaintiff left the state for two weeks. Upon return, the plaintiff found that during his absence and without his knowledge, consent or participation, the defendant had entered into an option agreement with Lynch for the sale of the land. This option was later exercised and the land conveyed from defendant to Lynch by deed dated June 15, 1970.
When defendant sought his commission upon learning of the option, the defendant's reply (via Mr. Carrigan) was that he should just forget the deal as Lynch did not have good credit and would probably not be able to exercise the option.

It is correct, and this is key, that under the terms of plaintiff's employment by defendant it was necessary for him to present to defendant a signed sales contract, together with a deposit, in order for plaintiff to be entitled to payment of a commission by defendant. This was not done here and it is the defendant's position that this, without more, disqualifies plaintiff's claim.

Is the matter as simple as defendant contends? We think not. It is one of the most basic premises of contract law that where a party contracts for another to do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing the agreed thing. Indeed, if the situation is such that the co-operation of one party is a prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary co-operation. *Sharp v. Williams*, Fla.1939, 141 Fla. 1, 192 So. 476; *Hanover Realty Corp. v. Condomo*, Fla.1957, 95 So.2d 420. With more ready reference to the instant case, the encyclopedic treatment reveals this basic proposition:

> '148. -Condition Precedent.
>
> 'One who prevents or makes impossible the performance or happening of a condition precedent upon which his liability by the terms of a contract is made to depend cannot avail himself of its nonperformance. He cannot take advantage of his own wrong in

> such respect and relieve himself of responsibility to the promisee. Nor can he avail himself of a non-performance of such condition precedent, which he has himself occasioned against the consent of the promisee, in order to avoid his own liability on the contract.' 7 Fla.Jur., Contracts.

See also 17 Am.Jur.2d, Contracts, s 382, and 17A C.J.S. Contracts s 468 b.

The detailed treatise exposition of the same rule is found in 3A Corbin on Contracts, §§ 767 and 768.

To hypothetically illustrate, suppose defendant contracted to pay for a basket of groceries upon delivery to defendant's 'kitchen table.' The defendant does not answer the door at the grocer's knock. The grocer leaves the grocery basket at the defendant's doorway, being unable to place it on the 'kitchen table,' and departs. Defendant, in the absence of the grocer, takes possession of the groceries and later refuses the grocer's demand for payment on the ground that the grocer did not deliver the items to the 'kitchen table.' The defendant received the benefit of the groceries for which he had contracted. He defeated the ability of the grocer to deliver the groceries in the manner contractually prescribed. The defendant in law is on infirm ground and is obliged to pay for the groceries regardless of the grocer's nonperformance as concerns delivery to the 'kitchen table.'

Looking now to the evidence favorable to the plaintiff in this case and the allowable inferences that are available to the jury, it would be generally entitled to find that the plaintiff produced the prospect, Mr. Lynch, and was the procuring cause of the sale of the defendant's land to Lynch. It could find that the plaintiff performed every jit and jot of this contract except that he did not fulfill the requirement of presenting the signed contract and deposit. However, the jury would be entitled to infer and find in light of the mentioned authorities that the defendant knew full well of the plaintiff's negotiations and nearly consummated sale at the time it stepped into the picture and procured the contract and ultimate sale. In other words, the defendant, by taking advantage of the plaintiff's absence and going forward with the transaction did actively and wrongfully prevent the plaintiff from fulfilling the condition precedent. For similar factual case situations, *see Knowles v. Henderson*, Fla.1945, 156 Fla. 31, 22 So.2d 384, 169 A.L.R. 600; *Hart v. Pierce*, Fla.1929, 98 Fla.1087, 125 So. 243; *Oro Verde Groves, Inc. v. Fuchs*, Fla.App.1962, 136 So.2d 12; *Sanders v. Devereux*, 1963, 231 Md. 224, 189 A.2d 604. The defendant can not take advantage of its conduct in the premises and the plaintiff did, therefore, make out a more than sufficient case to withstand a motion for directed verdict.

There are a number of other facets or viewpoints that might be considered when the case is re-tried. We would wonder in passing if the plaintiff had not substantially performed his contract so as to entitle him to recover. 7 Fla.Jur., Contracts, s 136. Another proposition that could be plumbed is the notion that the defendant, by accepting the partial performance of the contract and where the defendant by his own conduct prevents the plaintiff from making full performance, the plaintiff would be entitled to recover for such services, at least on the basis of quantum meruit, 7 Fla.Jur., Contracts, §§ 136, 137 and 138, and, of course, consideration should be given to whether the defendant waived the condition precedent because of his conduct. 7 Fla.Jur., Contracts, s 146.

Reversed and remanded for proceedings consistent herewith.

Reversed and remanded.

MAGER and DOWNEY, JJ., concur.

(2). Limitations on Implying Duties

Florida law recognizes at least two limitations on the implication of the duties of good faith and fair dealing as a matter of law.

INSURANCE CONCEPTS AND DESIGN, INC. v. HEALTHPLAN SERVICES, INC.

District Court of Appeal of Florida, Fourth District, 2001

785 So. 2d 1232

PER CURIAM.

The issue presented in this appeal is whether a cause of action can be maintained for a breach of an implied covenant of good faith and fair dealing absent the allegation that the breaching party failed to perform an express provision of the contract. The trial court dismissed the complaint. We adopt the well-reasoned opinion of the trial court as our own, and reproduce it herein:

1. History of the Case

Plaintiff filed its original complaint on September 20, 1999. This complaint alleged a claim for breach of a duty of good faith and fair dealing against HealthPlan Services, Inc. (“HPS”). HPS filed a motion to dismiss the complaint. A hearing was held on December 3, 1999 on the motion to dismiss and this court entered an order on December 8, 1999 granting HPS's motion to dismiss with leave to amend.

Plaintiff served its first amended complaint on December 23, 1999. This amended complaint also alleged a breach of the duty of good faith and fair dealing against HPS. HPS filed a motion to dismiss the complaint asserting that the amended complaint still failed to state a cause of action and was not substantially different from the original complaint. A hearing was held on March 24, 2000 on the motion to dismiss and this court entered an order on April 5, 2000 granting HPS's motion to dismiss with leave to amend. On April 24, 2000 Plaintiff served its second amended complaint which contained one count for breach of contact [sic] and one count for breach of the duty of good faith and fair dealing. HPS again moved to dismiss and also moved for summary judgment on the breach of contract count. The issues were briefed by both parties and oral argument conducted on August 4, 2000.

* * *

3. Applicable Law.

Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract. *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir.1999)[, *cert. denied*, 528 U.S. 948, 120 S.Ct. 370, 145 L.Ed.2d 287 (1999)]; *Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1438 (S.D.Fla.1996); *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So.2d 1049, 1050 (Fla.1997); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. 3d DCA 1981). This covenant is intended to protect “the reasonable expectations of the contracting parties in light of their express agreement.” *Barnes*, 932 F.Supp. at 1438.

However, there are two restrictions on causes of action for the breach of good faith and fair dealing. First, the implied covenant of good faith should not be invoked to override the express terms of the agreement between the parties. *Weaver*, 169 F.3d at 1317–18; *Barnes*, 932 F.Supp. at 1438; *City of Riviera Beach v. John's Towing*, 691 So.2d 519, 521 (Fla. 4th DCA 1997). Second, a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached. *Weaver*, 169 F.3d at 1317–18; *Nautica Int'l, Inc. v. Intermarine USA, L.P.*, 5 F.Supp.2d 1333, 1340 (S.D.Fla.1998)(finding as a matter of law that plaintiff stated claim because it alleged an express breach of contract); *Anthony Distrib., Inc. v. Miller Brewing Co.*, 941 F.Supp. 1567, 1574 (M.D.Fla.1996); *Barnes*, 932 F.Supp. at 1438–39; [*Burger King*

Corp. v.] Holder, 844 F.Supp. [1528, 1530 (S.D.Fla.1993)]. A duty of good faith must

> relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements.

Hospital Corp. of America v. Florida Med. Ctr., Inc., 710 So.2d 573, 575 (Fla. 4th DCA 1998)(emphasis added). The duty of good faith does not attach until the Plaintiff can establish a term of the contract that HPS was obligated to perform. Id.; *see also Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1314 (11th Cir.1998)("[G]ood faith requirement does not exist 'in the air'. Rather, it attaches only to the performance of a specific contractual obligation."). Allowing a claim for breach of the implied covenant of good faith and fair dealing "where no enforceable executory contractual obligation" remains would add an obligation to the contract that was not negotiated by the parties. Hospital Corp., 710 So.2d at 575.

Florida courts have not addressed whether an agent may recover for lost commissions as a result of an insurer acting in bad faith to its customers. Courts in other jurisdictions that have addressed this issue have determined that an agent may not recover for damages in such a situation. *See Sterling Colorado Agency, Inc. v. Sterling Insurance Co.*, 266 F.2d 472, 474 (10th Cir.1959)(holding an agent is not a third party beneficiary under the insurance policy and the implied promise of good faith dealing on the agent's contract does not preclude the insurer from contracting with third parties according to its judgment of business interests; even if it acted in bad faith in regard to its policyholders, the company is answerable only to the policyholders); *accord Keith v. Alexander Underwriters Gen. Agency, Inc.*, 226 Ga.App. 838, 487 S.E.2d 673, 675 (1997)("If a policy was inappropriately canceled or mishandled, a claim against the insurer could be asserted only by the policyholders[.]"); *see also Iglesias v. Mutual Life Ins. Co. of New York*, 156 F.3d 237, 240 (1st Cir.1998)(Provision in agent's contract authorizing him to "solicit applications for insurance in MONY of the types of insurance which MONY is issuing" did not limit the company's ability to withdraw products from the agent's market; to find otherwise "would flip the employment relationship between MONY and its agents on its head[.]"); Fidelity Ins. Agencies v. Citizens Cas. Co. of New York, 194 F.2d 43, 47–48 (7th Cir.1952) (Insurance company's agreement to appoint agent to solicit business in a prescribed territory for five years was not of itself an agreement by the company to continue to do business within that territory for the entire term of the contract); *Winnick v. Alvin and Co., Inc.*, No. 3:95CV0415, 1998 WL 698498, *7 (D.Conn. Mar.16, 1998) ("A disappointment in earnings expectations is not a sufficient ground for finding a lack of good faith or unfair dealing[.]").

The Plaintiff points to *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092 (Fla. 1st DCA 1999)[,] for support of its position. This case is inapposite. In Cox, CSX had exclusive rights to the plaintiffs' trucking services. It also had contracts with other trucking companies. Under the terms of the agreement, CSX was not required to furnish any specific amount of freight or number of loads for transport at any particular time or to any particular place. The plaintiffs sued alleging that CSX's employee was exercising its discretion in allocating the loads to the various companies, in an arbitrary, fanciful and unreasonable manner. Although the appellate court found no breach of the express terms of the contract, it determined that issues of fact existed as to whether the manner in which CSX exercised its discretion violated the implied duty of good faith. Id. at 1098.
Unlike the case at bar, in Cox there was an express provision in the contract, the allocation of loads between Cox and other carriers, that was allegedly not performed in good faith. The plaintiff here can point to no such provision in the contract.

4. Conclusions.

Under the Contract, HPS is obligated to the Master Broker to pay an override commission based on successful sales of its assigned agents. The Contract does not obligate HPS to provide any particular level of service to the customers. There is no provision in the Contract that obligates HPS to continue to pay commissions to either the agents or the Master Broker if a customer cancels its agreement with HPS for any reason and HPS is no longer receiving income from the account. In fact, the Contract expressly provides that commissions will be payable only on insurance maintained in force by payment of cash premiums.

The Plaintiff's second amended complaint like the two prior complaints still fails to identify any specific provision of the Contract that was breached. The Plaintiff has continually asserted as a basis for its claim the breach of “implicit” terms of the contract. However, these “implicit” provisions have no basis in law or in fact and cannot support a cause of action for breach of contract or breach of the implied duty of good faith and fair dealing.

* * *

The decision of the trial court is affirmed.

WARNER, C.J., STEVENSON and HAZOURI, JJ., concur.

B. Common Law Special Cases – Fiduciary Relationships

The *McCoy* excerpt sets out the common law fiduciary duties, implied in law, between business partners of a limited liability corporation. It should be noted that the Florida Legislature has enacted substantial legislation either modifying these common law duties (sometimes by defining them conservatively) or by specifically permitting their disclaimer. These issues are beyond the scope of this Chapter, but it is worthy of note that this is not the only time that a legislature has statutorily reduced the scope of responsibility when it believes that the common law has become too generous. Perhaps not the cleanest case to indicate these kinds of implied-in-law duties, the next case nevertheless does make the point.

MCCOY v. DURDEN

District Court of Appeal of Florida, First District, 2014

155 So. 3d 399

VAN NORTWICK, J.

Don G. McCoy (McCoy), Charles Voorhis, Larry L. Lee, Gary Walsingham, and Harvey Hollingsworth, derivatively on behalf of nominal defendant Magic Broadcasting, LLC (Magic), [footnote omitted] a Florida limited liability company (LLC), appeal a final order granting summary judgment in favor of Michael E. Durden (Durden), Durden Enterprises 2, Inc. (DE2), a Delaware corporation, and Durden Enterprises, LLC (DE1), a Florida limited liability company, appellees, in the appellants' action for breach of fiduciary duty and an accounting. Because there are numerous questions of material fact relating to whether the appellees breached their duty of loyalty under the Florida Limited Liability Company Act (LLC Act), section 608.4225, Florida Statutes (2011), [footnote omitted] as modified by the operating agreement for Magic, the trial court erred in granting summary judgment. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

* * *

Fiduciary Duty

Under Florida's common law, the Florida Supreme Court has defined the concept of fiduciary duties broadly reflecting its historical origin in equity. In *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419 (1927), a case involving allegations that a real estate broker had violated his fiduciary duty, the Court explained the basis of the duty:

> The term 'fiduciary or confidential relation,' is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused—in which

> confidence has been reposed and betrayed. The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.
>
> * * *
>
> Stripped of all embellishing verbiage, it may be confidently asserted that every instance in which a confidential or fiduciary relation in fact is shown to exist will be interpreted as such. The relation and duties involved need not be legal; they may be moral, social, domestic or personal. If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial.

Id. at 420–21; *see also Doe v. Evans*, 814 So.2d 370, 374 (Fla.2002) (quoting Restatement (Second) of Torts § 874 cmt. a) ("A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation.").

As early as 1907, the Court recognized that under the Florida common law a director was in a fiduciary relationship with the corporation. *See Jacksonville Cigar Co. v. Dozier*, 53 Fla. 1059, 1065–68, 43 So. 523, 525 (1907). Other early Florida cases described the relationship between a corporation and its directors and officers as involving:

> a quasi fiduciary relation to the corporation and its stockholders.... They are required to act in the utmost good faith, and in accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and to exercise the powers conferred solely in the interest of the corporation.

Orlando Orange Groves Co. v. Hale, 107 Fla. 304, 313–14, 144 So. 674, 677 (1932) (citations omitted). Florida courts have continued to describe the duties of a director and an officer to the corporation as arising from trust and equity concepts. In *Snead v. U.S. Trucking Corp.*, 380 So.2d 1075, 1078–79 (Fla. 1st DCA 1980), we explained:

> A director's duties being trust duties or in the nature of the duties of a trustee toward his cestui que trust, his acts are subject to be tested by the rules governing the relation of a trustee to his cestui que trust.... He is bound to act with fidelity, the utmost good faith, and with his private and personal interests subordinated to his

> trust duty whenever the two come in conflict. Courts of equity must enforce strict compliance with these rules.

(citation omitted).

In short, Florida courts have recognized that corporate officers and directors owe both a duty of loyalty and a duty of care to the corporation that they serve. *See Cohen v. Hattaway*, 595 So.2d 105 (Fla. 5th DCA 1992*); B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. 3d DCA 1978). [Footnote omitted]

Although unrelated to fiduciary duty concepts, Florida courts have also recognized that "[e]very contract includes not only its written provisions, but also the terms and matters which, though not actually expressed, are implied by law, and these are as binding as the terms which are actually written or spoken." *First Nationwide Bank v. Florida Software Servs., Inc.*, 770 F.Supp. 1537, 1542 (M.D.Fla.1991). One of the implied contract terms recognized in Florida law is the implied covenant of good faith, fair dealing, and commercial reasonableness*. Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999); *see also Scheck v. Burger King Corp.*, 798 F.Supp. 692, 700 (S.D.Fla.1992); *First Nationwide Bank*, 770 F.Supp. at 1542; *Green Companies, Inc. v. Kendall Racquetball Invs., Ltd.*, 560 So.2d 1208, 1210 (Fla. 3d DCA 1990); *Fernandez v. Vazquez*, 397 So.2d 1171, 1173–74 (Fla. 3d DCA 1981). This implied covenant arises because "[a] contract is an agreement whereby each party promises to perform their part of the bargain in good faith, and expects the other party to do the same." *First Nationwide Bank*, 770 F.Supp. at 1544. Thus, the implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations. *Cox*, 732 So.2d at 1097.

5 Cox described the covenant as a constraint upon the discretion granted to one party under the terms of the contract. *Id.* at 1097–98.

> Thus, where the terms of the contract afford a party substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party.

Id. Although the covenant arises from a contract, the implied covenant of good faith and fair dealing cannot be used to vary the express terms of a contract. *Id.* at 1098; *see also Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Heidrick & Struggles, Inc.*, 188 Fed.Appx. 966 (11th Cir.2006).

* * *

[*The remainder of the majority opinion analyzed Florida's Limited Liability Company Act and its statutorily created limitations on the sweeping common law fiduciary duties. Some common law duties remain, but others are limited by statutory definition and others may even be disclaimed by agreement of the parties to an incorporation or operating agreement.*]

* * *

REVERSED and REMANDED for further proceedings consistent with this opinion.

WOLF, J., concurs, and MARSTILLER, J., dissents with opinion (omitted).

C. Implied Conditions in Regulated Industries

(1). Municipalities

CITY OF WINTER PARK v. SOUTHERN STATES UTILITIES, INC.

District Court of Appeal of Florida, Fifth District, 1989

540 So. 2d 178

COWART, Judge.

Appellant, City of Winter Park, enacted, pursuant to section 180.02(3), Florida Statutes, an ordinance extending its corporate power over its municipal sewer service zone outside its corporate limits so as to require property owners outside the city but within such service zone to connect to the city's sewer system when it became available. Appellee Southern States Utility, Inc., a non-governmental utility company (public service corporation) with a certificate issued by the Florida Public Service Commission (PSC) pursuant to section 367.031, Florida Statutes, authorizing it to provide sewer service, entered into a contract with appellee landowners to supply sewer service to a tract of land lying within a portion of the area embraced within the city's ordinance where the city does not presently have sewer service capability.

The city filed this action against the utility company and the landowners alleging that the utility company was providing sewer service to the landowners within the city's exclusive sewer service zone and that the city would have capacity to serve the land owners' property by a date about 17 months in the future from the date the action was originally filed. The complaint prayed for a declaratory judgment to the effect that the landowners would be required to disconnect from the utility company's sewer system and

connect with the city's sewer system when the city could provide sewer service.

The trial court held that the city under its ordinance could compel the landowners to connect with its sewer system only if the city sewer treatment capacity was available at the time it was needed by the landowners and found that there was no material issue as to the fact that the city did not have the present ability to provide sewer service to the landowners' property and that, accordingly, the utility company was free to contract to provide sewer service to the landowners' property without intervention [interference] from the city. Although not affirmatively expressed, the effect of the trial court's denial of the city's prayer for a declaratory judgment that the landowners would be required to disconnect from the utility company's sewer system and connect with the city's sewer system when it became available and entry of summary judgment against the city was that the landowners would not be required to terminate their sewer service contract with the utility company and connect to the city's sewer system if and when it became available to the landowners' property. The city appeals.

Interestingly, this litigation is somewhat of a shadow of a prior litigation as to the same issue between the same parties that came about as follows: earlier, the utility company applied to the Public Service Commission to amend its certificate of public necessity to provide sewer service to the property now in question and other property. The city objected. The PSC, by order numbered 18525, and dated December 9, 1987 (87 FPSC 12:125), found that the city had more demand for sewer service than it had capacity and that while the city expected to be able to provide sewer service at some time in the future, the city would not execute a commitment to provide sewer service and desired to place those needing service on a list to wait until the city could provide service while the utility company had existing unused sewer treatment capacity and was willing and able to serve the public. As to the city's claim to the exclusive right to serve the property in question under its municipal service zone, the commission noted that it is not bound by the city's ordinance extending its corporate power beyond its city limits, nor by a local comprehensive plan enacted under section 163.3161, Florida Statutes, stating that the test was who was in the best position to provide the needed sewer service which the commission found to be the utility company rather than the city. The commission expressly declined the city's request that the utility company's certificate for authority to serve this area be issued subject to the condition requiring disconnection when the city became able to supply sewer service, noting that the commission had no jurisdiction over the city sewer system.[1] The city appealed the Public Service Commission's order to the First District Court of Appeal which affirmed. *See City of Winter Park v. Southern States Utilities*, 530 So.2d 310 (Fla. 1st DCA 1988).

We agree with the Public Service Commission and the trial court. All corporations which voluntarily undertake to engage in performing a service of a public nature whether a governmental agency, such as a municipality, or a private corporation, assume an obligation implied by law to render, for reasonable compensation and without discrimination and to all of the public in the area sought to be served, a service reasonably adequate to meet the just requirements of those sought to be served. [Footnote omitted]

A city cannot undertake to extend its service franchise beyond an area it is able to serve and thereby prevent the public from being served by anyone else. The public is entitled to be served and served by the entity best able to serve it. In this case, the utility company is able to provide the public with the service that the city is unable to provide. The city has no legal right to prevent the utility company from serving the consuming public and no right to require the public to disconnect from the utility company that can now serve it and connect with the city's sewer system if and when the city gets around to meeting its duty to provide the service that it has undertaken to provide.

AFFIRMED.

DAUKSCH and DANIEL, JJ., concur.

Footnote 1: Section 367.022(2), Florida Statutes, exempts utility systems owned, operated, managed or controlled by governmental agencies from the jurisdiction of the PSC. It is said that the legislature reasons that it is unnecessary for the PSC to exercise regulatory power over a municipal utility because the people own the utility and it functions for their benefit and they have elective control over the officials operating the utility. *See generally* 43 Fla.Jur.2d Public Service Commission § 37 [Jurisdiction] Over Municipalities and Cooperatives (1983). When a municipal utility operates beyond its corporate limits, the residents there being served do not own the utility and are not electors in that city. Query: Who regulates the municipal utility in the interest of those served outside the municipality?

(2). Quasi-Public Utilities

STATE v. ATLANTIC COAST LINE R. CO.

Supreme Court of Florida, 1907

53 Fla. 650

WHITFIELD, J. (after stating the facts).

* * *

In the case of Loraine v. Pittsburg, J., E. & E. R. Co., 205 Pa. 132, 54 Atl. 580, 61 L. R. A. 502, the court, in awarding mandamus to compel the railroad company to continue to furnish cars that it had been furnishing, but had

ceased to furnish, said: ‘The defendant, under the statute from which it derives its being, is a common carrier, and as such has imposed upon it certain public duties, such as to construct its road, to equip it with cars and locomotives, and employ hands to run them for all the public. This is a public duty. If it fail in performing it, it fails to carry out the very purpose of its charter, and the public, without distinction, suffers by the breach of duty. In such case, both at common law and under our statute of 1893, proceedings should be instituted by the commonwealth at the instance of the Attorney General.’

‘While the law affords railroad corporations adequate and complete protection in the exercise of their chartered rights, it also holds them to a strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted.’ Railroad Commissioners v. Portland & O. C. R. R. Co., 63 Me. 269, 18 Am. Rep. 208.

‘The object of incorporating railroad companies is to secure to the public increased facilities for transit from point to point, and an improved mode of carrying persons and property. * * * Railroad companies are creatures of the law, and are intrusted with the exercise of certain powers to promote the public interest, and are therefore bound to conduct their affairs in furtherance of the public objects of their creation.’ People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

‘All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by mandamus to do it; and it will not be questioned that in the case of public highways, whether turnpikes or railroads, they are bound to keep them fit for use, and, in the case of railroads, to keep them furnished with suitable cars, engines, and attendants, without which they cannot be used at all.’ State v. Hartford & N. Haven R. R. Co., 29 Conn. 538.

‘A railroad company is a quasi public corporation, and all its rights and powers are conferred upon it, not merely for the benefit of the corporation itself, but also in trust for the benefit of the public; and, whenever it neglects or fails to perform any of its corporate duties, it may generally be compelled to perform the same by an action of mandamus. The duty resting upon a railroad corporation to perform whatever has been legally enjoined upon it by legal and proper authority is a duty resulting from a public trust, and is also a duty resulting from a public station; and the public may, through the Attorney General, enforce the performance of such duty by mandamus, whenever no other plain and adequate remedy exists.’ State v. Missouri Pac. Ry. Co., 33 Kan. 176, 5 Pac. 772.

‘The duty of a railroad company to carry and charge only reasonable compensation are incidents to its occupation as a common carrier. * * * It is

the duty of a common carrier to receive and carry whatever is properly offered to it for carriage. * * * The safety of human life and the good of every public interest require of railroads the soundest condition, the fullest equipment, and most skillful and careful operation; and it is the province of the court to enforce, when properly called upon, the law which imposes these entirely proper and indispensable demands.' Pensacola & A. R. Co. v. State, 25 Fla. 310, 324, 325, 326, 5 South. 833, 839, 840, 3 L. R. A. 661.

'It must also be remembered that railways are public corporations, organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of a citizen in invitum is not the least (Cherokee Nation v. Southern Kansas Railway Co., 135 U. S. 641, 657, 10 Sup. Ct. 965, 34 L. Ed. 295); that many of them are the donees of large tracts of public lands and of gifts of money by municipal corporations; and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders.' United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, text 332, 17 Sup. Ct. 540, 41 L. Ed. 1007; North Carolina Corporation Commission v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191.

'It is a well-settled doctrine that a corporation may be compelled by a writ of mandamus to perform a duty imposed by statute. The duty need not be express. It may be implied. Clearly, when it appears by fair implication from the terms of the charter, it is as imperative as if the obligation were expressed. But as to corporations quasi public in character, such, for example, as those chartered for the carriage of passengers and freight, there are decisions which hold that they owe certain duties to the public which they may be compelled to perform, although not enjoined by their charters, either in express terms or by specific implication.' San Antonio St. Ry. Co. v. State, 90 Tex. 520, text 523, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834.

'No better general rule can be laid down upon this subject than that where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty either in terms or by fair and reasonable construction and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded.' 1 Redfield on Railways (5th Ed.) 678.

'The duty to keep in proper repair a portion of the public's highway is a duty to the public and of a quasi official character; and that duty is one that the law itself makes incumbent upon the defendants, and it is for the benefit of the public at large and for the general welfare; and we think it is wholly immaterial that the duty is imposed by a rule of common law, and is not created by some positive and express provisions of a statute, or secured to the public through chartered privileges.' Haines v. People, 19 Ill. App. 354.

‘A railroad company is bound at common law, independently of any statute, to use at least ordinary diligence in procuring a sufficiency of cars to carry all the freight tendered it, and certainly all that is accepted by it for shipment.’ Branch v. W. & W. R. Co., 77 N. C. 347.

‘There can be no doubt of the duty of a railway company to keep its road in a reasonable state of repair and in a safe condition; nor is there any doubt of its duty to so operate it as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. This is equally true with respect to passengers and freight. As to the extent or sufficiency of these facilities, including the number and frequency of trains, that is to be judged of and governed chiefly by the amount of business on the line of the road. The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road.’ Ohio & M. Ry. Co. v. People, 120 Ill. 200, 11 N. E. 347.

* * *

The service rendered by a common carrier directly and vitally affects the public. To have such service properly rendered is a beneficial right, which the public are entitled to enjoy. If the service is not properly rendered, it causes loss and inconvenience to the public, and perhaps endangers the lives and property of all those to whom it is extended. Therefore it is a fundamental duty of the state to rigidly require a proper rendering of this useful public service.

In order to legally and properly render the service incumbent upon a public common carrier, it is essential that it shall have and exercise certain rights, powers, franchises, and privileges not possessed by individuals, but which can be conferred upon it by law. These rights, powers, franchises, and privileges, when granted and accepted or exercised, by implication of law impose upon the common carrier obligations and duties commensurate with the character and extent of the grants of power to it and the purposes for which they are made.

Common carrier railroad corporations are created by law, and among the rights, powers, franchises, and privileges granted to them are to exist as a corporate entity, and as such to make contracts and to render service to the public for compensation, with limited liability of its shareholders, to own and use property, to construct its lines and to operate them, to take private property for use in the public service it renders upon payment of just compensation therefor, to engage in the business of a public common carrier, and to demand and receive reasonable compensation for the service rendered. Other rights and powers are often conferred by law, and in this case large and valuable donations of land are alleged to have been made by the state to aid the defendant carrier in equipping itself for the rendition of this service. All of

this, however, is done for the purpose of procuring a suitable and sufficient service to the public. When a state confers or permits the exercise of these and other rights, powers, franchises, and privileges, the law imposes upon the railroad corporation receiving or exercising them the duty of rendering to the public a service adequate to meet all reasonable requirements. In order to render to the public an adequate service, such a corporation must provide and maintain safe and convenient roadbed, track, motive power, rolling stock, equipment, appliances, facilities, operation, control, direction, and management adequate to meet the reasonable demands of the service it undertakes to render, so as to best serve the reasonable requirements of the public. The duty is implied by law in conferring the franchises and privileges, or in permitting their use, whether the provisions of the grants be mandatory or merely permissive, and the acceptance or exercise of the rights carries with it the duty of properly rendering the public service undertaken by virtue of the rights conferred or permitted to be exercised.

There is also imposed by law upon a common carrier railroad company the duty to receive and transport in a reasonably prompt, safe, and convenient manner, and without unjust discrimination, all passengers and freight properly offered to it for carriage.

When a corporation is clothed with the rights, powers, and franchises of a common carrier, it becomes in law subject to governmental regulation and supervision; and it assumes the burden of providing all proper means, appliances, and facilities for rendering the public service that it has been assigned to do and that it has undertaken to do, and of maintaining and operating all the property devoted to such use, in a safe, convenient, and efficient condition, adequate to meet all reasonable requirements of the public service.

Where a railroad corporation undertakes to render to the public the service of a common carrier, it is in law primarily and essentially charged with the duty and burden of providing reasonably adequate and proper roadbed, track, motive power, equipment, and facilities for the service required, and of maintaining and operating its property so as to render to the public without unjust discrimination a reasonably safe and adequate service. See State ex rel. Lamar v. Jacksonville Terminal Co., 41 Fla. 377, text 411, 27 South. 225; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; City of Bridgeton v. Bridgeton & M. Traction Co., 62 N. J. Law, 592, 43 Atl. 715, 45 L. R. A. 837; Branch v. Wilmington & Weldon Ry. Co., 77 N. C. 347; Chicago & Alton R. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599.

* * *

An order will be entered that, unless the Attorney General shall within 10 days amend the alternative writ so as to conform to the principles announced in this opinion, the motion to quash the alternative writ will be granted.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, HOCKER, and PARKHILL, JJ., concur.

Notes

54. Particularly where there is a consumer protection animus, courts seem quite willing to imply duties in the style of good faith and fair dealing. There is often a statutory basis behind it. A good example is the Magnusson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, which prescribes certain warranty protections from which manufacturers and sellers of consumer products may not deviate. This is often covered in Torts or Equities and Remedies courses.

55. State or federal laws may require special protections for consumers and the general public, but they may also take away such protections or place limitations on them. This is one of the major points to be taken from the *McCoy* case, where the Florida Legislature retreated from the broad common law protections involving fiduciary relationships (in that case, the law on limited liability companies).

56. Historically, the United States has tended to favor private operation of what would be considered "public" services, e.g., telephone and telegraph, rail transport, water and electric services. Many other countries establish ministries that operate such services. When the private sector is responsible for the day-to-day operations as well as profitability, it is no stretch of the imagination to foresee situations where the private, for-profit motive would cut against the public need. To avoid this, private providers are regulated. Such regulations often set the parameters of proper conduct and operations – which in turn provide the backdrop to imply duties where the regulations fall short. Where a formerly public service is being transferred to the private sector, typically with the creation of a regulatory framework, the process is known as *privatization*. A hybrid that requires the participation of both a public and a private actor is commonly known as a *public-private partnership*. These topics are beyond the scope of a first-year contracts course but it cannot hurt to be aware of these distinctions.

D. Sale of Goods Cases

Parties are free to change the rules that apply to them in many cases (not all). Absent a contractual provision to the contrary, sale-of-goods contracts include by implication the standard for what constitutes a breach by the seller: non-conformity with the terms of the contract. (Yet again, a case involving the perfect tender rule is involved).

JAREGUI v. BOBB'S PIANO SALES AND SERVICE, INC.

District Court of Appeal of Florida, Third District, 2006

922 So. 2d 303

SCHWARTZ, Senior Judge.

The plaintiff purchased a piano from the defendant which was represented to be in new condition but was delivered with unacceptable damage. He appeals from the judgment of a successor judge vacating a judgment [footnote omitted] of his predecessor in plaintiff's favor for the return of the purchase price from the defendant (and that of the piano to the defendant) and found instead that he had sustained no recoverable damages. [Footnote omitted]

* * *

2.

Second, and more important, the judgment on review was erroneous as a matter of law. It is based on the rationale that because, even in its defective condition, the piano was worth as much or more than plaintiff actually paid, no actionable damages had been sustained for breach of the contract for purchase and sale. *See Carter Hawley Hale Stores, Inc. v. Conley*, 372 So.2d 965 (Fla. 3d DCA 1979). It is the law, however, as reflected in the judgment rendered by the actual trial judge, that, in a case such as this one, the purchaser of non-conforming goods like the offending piano retains the option to claim either the difference in value or, as plaintiff clearly did in this case, in effect, to cancel the deal and get his money back. See §§ 672.711, .714, Fla. Stat. (2005*); Fryatt v. Lantana One, Ltd.*, 866 So.2d 158 (Fla. 1st DCA 2004); *Winterbotham v. Computer Corps, Inc.,* 490 So.2d 1282 (Fla. 5th DCA 1986); *Royco, Inc. v. Cottengim*, 427 So.2d 759 (Fla. 5th DCA 1983), *review denied*, 431 So.2d 989 (Fla.1983); *Carter Hawley Hale Stores, Inc.*, 372 So.2d at 965; *see also Music Acceptance Corp. v. Lofing*, 32 Cal.App.4th 610, 39 Cal.Rptr.2d 159 (1995)(applying rule to delivery of defective piano). This principle is based on the common sense idea that the purchaser is entitled to receive what he wanted to buy and pay for and that the seller is not free to supply any non-conforming item she wishes just so long as the deviant goods are worth just as much. See §§ 672.106(2), .601, .608, Fla. Stat. (2005); *Barrington Homes of*

Fla., Inc. v. Kelley, 320 So.2d 841 (Fla. 2d DCA 1975). The initial judgment properly reflects this ethic and is therefore reinstated. [Footnote omitted]

* * *

2. Substantial Performance

Using a wills and estates case to make the point might not be ideal, but it is important to remember that many of the rules of contract law, including those of interpretation and construction, apply equally to deeds, wills, and even marital agreements – and vice versa. In fact, the *In re Boyar* case relies on a truly commercial case from Texas for its ruling (were that a Florida case made the same point in a truly commercial, and not a decedent's estate, case – which will hopefully follow in due course). The major import is that courts try to avoid forfeiture where possible, and the classic example is taking what looks like a *condition* in a contract and construing it as a *covenant* or *promise*. Breach of condition would prevent a duty from arising or would cut one off, technically leading to significant forfeiture for the party against whom the loss would rest. In contrast, if a contractual requirement is interpreted as a *covenant* or *promise*, then the analysis for failure would be one of breach and would therefore take into account the level of flawed performance to reduce, but not necessarily eliminate, the amount owed to the breaching party. In fact, construing a potential condition as a *covenant* or *promise* is one of the quintessential examples of court interpretation. In fact, it stems from the rule of construction against forfeiture. These matters are addressed in Chapter 14 and 16.

A. Mechanics and Purposes

IN re ESTATE OF BOYAR

District Court of Appeal of Florida, Fourth District, 1992

592 So. 2d 341

PER CURIAM.

This case involves the enforcement of a contract between husband and wife in which they agreed not to alter or change the testamentary disposition contained in their respective wills. The trial court held the contract was valid and that the surviving husband breached it when he executed a new will changing his testamentary disposition. The trial court rendered two summary judgments in favor of the previous will's beneficiaries, and the personal representative of the deceased husband's estate has appealed both.

Leonard and Dorothy Boyar, husband and wife, executed their wills, the former on September 27, 1978, and the latter on September 28, 1978. Also on September 28th, they executed an agreement styled AGREEMENT NOT TO REVOKE OR CHANGE WILL. Said agreement contained two sections, one styled WILL NOT BE REVOKED OR CHANGED and the other CUSTODY OF WILL AND CONTRACT. In Section One, Dorothy agreed not to change or revoke her will or make a new will which would reduce her bequest to Leonard's son, Robert Boyar. Leonard agreed that he would not revoke or change his will which devised and bequeathed his estate to his son, Robert, and to Dorothy's designated children or grandchildren. Section Two provided that an executed copy of the contract, together with Dorothy's original will of September 28th and Leonard's original will of September 27th were to be deposited with William T. Stephens, Dorothy's brother and the lawyer who prepared both wills and the contract involved herein.

Dorothy died in 1986 and her 1978 will was deposited with the Broward County Circuit Court. However, no probate proceedings were initiated because all of Dorothy's property was held as tenancies by the entirety with her husband Leonard. Some three years after Dorothy's death, Leonard executed a new will, dated August 30, 1989, in which he abandoned the testamentary disposition contained in his 1978 will and left his entire estate to his brother, a sister, and a friend. The later will was admitted to probate, and the various beneficiaries of the previous 1978 will filed claims against the estate for breach of the contract not to revoke or change the 1978 will. The trial court ruled in favor of the beneficiaries of the 1978 will, and thus against the personal representative of Leonard's estate.

The personal representative of the estate, as the proponent of the 1989 will, seeks reversal of the trial court's judgments on the procedural ground that summary judgment was premature because of the continued existence of genuine issues of material fact. Furthermore, on a substantive basis, appellant contends that the record indicated that Section Two of the September 28th contract was never complied with, in that neither Dorothy nor Leonard deposited their wills and the contract with William Stephens, and thus the contract never became effective.

The appellees assert that no genuine issues of material fact exist and that whether the wills and contract were ever deposited with Stephens is of no legal consequence vis-a-vis the legal effect of the contract not to revoke their wills.

Initially, we note that it is not clear whether the wills and contract were ever deposited with Stephens. What is clear is that both the wills and contract were properly executed; and that when Dorothy died, her will was in her possession and no one seems to know where the original contract is located. As indicated above, Stephens prepared the wills and the contract, and he testified by

deposition that he has an office file that contains only copies of the papers that he prepared. He has no recollection whether the wills and contract were ever deposited with him, and, if deposited, when they were returned to Dorothy and Leonard.

The trial judge was not impressed with the arguments presented by appellant and found that there was nothing facially in the agreement which indicated that depositing the wills and contract with Stephens was a condition precedent to the validity of the contract. We agree.

As a general rule, conditions precedent are not favored, and courts will not construe provisions to be such, unless required to do so by plain, unambiguous language or by necessary implication. 17A Am.Jur.2d Contracts § 471 (1991). Some of the rules of construction associated with determining whether a doubtful provision is a condition precedent are set forth in *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1 (Tex.1976), wherein the court said:

> Conditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty. While no particular words are necessary for the existence of a condition, such terms as "if", "provided that", "on condition that", or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties.
>
> However, where the intent of the parties is doubtful or where a condition would impose an absurd or impossible result then the agreement will be interpreted as creating a covenant rather than a condition. This Court has on numerous occasions discussed the nature of conditions and covenants and as a general rule has noted that, "Because of their harshness in operation, conditions are not favorites of the law." The rule, as announced in *Henshaw v. Texas Natural Resources Foundation*, 147 Tex. 436, 216 S.W.2d 566 (1949), is that:
>
> > "Since forfeitures are not favored, courts are inclined to construe the provisions in a contract as covenants rather than as conditions. If the terms of a contract are fairly susceptible of an interpretation which will prevent a forfeiture, they will be so construed."

Id. at 3 (citations omitted).

Looking to the plain language in Section Two of the contract involved herein, we see no indication that this provision was intended to be a condition precedent to the contract's validity.

Furthermore, in *Palmquist v. Allardyce Petroleum Corp.*, 164 Mont. 178, 520 P.2d 783, 784 (1974), the court articulated another rule of construction to be considered when a finding that a provision may be a condition precedent, which would require a forfeiture:

It is a principle of contract law that a mere stipulation or covenant in a contract will not be construed as a condition precedent, particularly where a forfeiture would result and where it appears a condition precedent, if desired, could have been provided for by express agreement. 17A C.J.S. Contracts § 338; 12 Cal.Jur.2d Contracts § 171; 17 Am.Jur.2d, Contracts § 321.

The purpose of the contract between the Boyars was to guarantee that their mutual testamentary plan would reach fruition. They wanted to be certain that, if Dorothy's demise occurred first, Leonard's son Robert would inherit 25% of Dorothy's estate. If Leonard died first, they wanted assurance that 25% of his estate would pass to his son Robert and the remainder to Dorothy's designated children and grandchildren. The execution of the contract by the two parties accomplished that purpose and designating the situs or depository of the instruments was of minor significance absent language in the contract indicating an intention otherwise.

Finally, none of appellant's affirmative defenses appear to create genuine issues of material fact, and thus Leonard's revocation of his 1978 will constitutes a breach of the valid 1978 contract, and entitles the appellees to the summary judgments being reviewed. *See Roberts v. Stokley*, 388 So.2d 1267 (Fla. 2d DCA 1980), rev. denied, 394 So.2d 1153 (Fla.1981).

Accordingly, the judgments are AFFIRMED.

DOWNEY, HERSEY and DELL, JJ., concur.

B. Substantial Performance: Construction and Services Contracts

The following case adds an interesting wrinkle: there must be substantial performance for a contract to exist, and where a contract *does* exist, a contractor is entitled to file and enforce a mechanic’s lien to ensure payment for services rendered. The ability to apply the substantial performance doctrine is what allows the court to avoid a ruling that would lead to

forfeiture. Though understanding of mechanics liens is not vital to the rule currently being considered, they are addressed briefly in the Note below.

VIKING COMMUNITIES CORP. v. PEERLESS CONSTR. CO.

District Court of Appeal of Florida, Fourth District, 1979

367 So. 2d 737

BERANEK, Judge.

Viking Communities, plaintiff below, here appeals a final judgment entered in favor of Star Construction on a counterclaim in a third-party action.

Star Construction contracted with Viking to perform certain excavations on Viking's construction project. Payment was based on a unit price for the volume of material excavated. The contract estimated the volume of excavation and established a dollar amount which was not to be exceeded. The contract also provided for progress payments from Viking to Star. Work commenced and problems arose. The subsequent events are disputed, but several facts are apparent. The estimated volume of excavation was too low. Star fell behind schedule in completing the project and Viking withheld a progress payment. Star eventually ceased work altogether and Viking completed the work through another subcontractor. Star filed a complaint seeking recovery on two counts; foreclosure of a mechanic's lien and quantum meruit.

The case was tried by the Court resulting in a final judgment in favor of Star for the full amount claimed but denying the mechanic's lien. The trial court found that Star had breached the contract in failing to perform within the prescribed time but that no damages to Viking had occurred. The Court denied foreclosure of the mechanic's lien based upon the equitable theory of “unclean hands” as applied against Star. The Court entered judgment for the full amount claimed by Star under the breached contract but did so on the theory of quantum meruit. Viking here appeals that judgment and Star cross appeals denial of the mechanic's lien.

Since a contract is essential to any mechanic's lien, we look first to the enforceability of the basic contractual obligation. 22 Fla.Jur., Mechanic's Lien s 19. The doctrine of substantial performance prevails in this State and a contractor who substantially performs and is in good faith is entitled to enforce the contract even if performance has been less than complete. *Ocean Ridge Development Corp. v. Quality Plastering, Inc.*, 247 So.2d 72 (Fla. 4th DCA 1971). Where a contractor breaches a construction contract, the damages are generally determined by the amount in excess of the contract price which the owner reasonably expends to complete the project. Assuming

good faith substantial performance, recovery under the contract should be diminished by this amount. *Melnick v. Reynolds Metals*, 230 So.2d 490 (Fla. 4th DCA 1970), *Bryan v. Owsley Lumber Co.*, 201 So.2d 246 (Fla. 1st DCA 1967). Where a contractor complies with all provisions of Chapter 713, Florida Statutes, and has substantially performed the contract, he is entitled to a mechanic's lien. *See Poranski v. Millings*, 82 So.2d 675 (Fla.1955), and *American Motor Inns of Florida, Inc. v. Bell Electric*, 260 So.2d 276 (Fla. 4th DCA 1972).

Here, the trial court found a breach by the contractor, Star, but no damages to the owner. Nevertheless the mechanic's lien was denied because the court characterized Star as having “unclean hands.” The judgment makes no mention of substantial performance but the record indicates Star did substantially perform and a technical breach without damage is certainly consistent with substantial performance. A technical breach of contract alone may or may not result in unclean hands but under the circumstances here presented it should not have been the basis for denying the mechanic's lien. The Court erred in failing to grant to Star a mechanic's lien.

The final judgment granting full damages under the breached contract on a quantum meruit theory is the subject of Viking's appeal. If the contractor is entitled to prevail on the mechanic's lien aspect of the case, he is not also entitled to a full contract price recovery on the quantum meruit theory. We are, therefore, convinced that the Court misconceived the effect of the evidence and the judgment based on quantum meruit is also reversed. The matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

DOWNEY, C. J., and LETTS, J., concur.

STRATEGIC RESOURCES GROUP, INC. v. KNIGHT-RIDDER, INC.

District Court of Appeal of Florida, Third District, 2003

870 So. 2d 846

RAMIREZ, J.

Strategic Resources Group, Inc. appeals a final order granting appellee Knight-Ridder, Inc.'s, d/b/a The Miami Herald Publishing Company, motion for summary judgment and denying its own motion for summary judgment. Because we conclude that Knight-Ridder substantially performed its obligations under the parties' advertising contract, we affirm.

In 1992, Knight-Ridder entered into an advertisement contract with Brighton Homes Development. The contract incorporated rate cards into the agreement. Section 4 of the incorporated rate cards, entitled “General Rate Policy, Advertising Terms and Conditions,” provided that Brighton agreed to “designate the width in columns and exact depth in inches [of the advertisement to be published]” and Knight-Ridder “agreed to publish and bill the ad for the exact space published.” Section 4 of the rate card, in the subsection titled “Herald's Rights Regarding Copy,” also established Knight-Ridder's reservation of the right to “revise, alter or reject any advertisement for any reason but no change in advertising copy will be made without [the customer's] prior consent.” Furthermore, under the subsection entitled “Liability of Publisher,” Knight-Ridder disclaimed liability for any “general, special or consequential damages” resulting from publishing errors. This subsection also stated that Knight-Ridder would only give full credit when “the error completely destroy [ed] the effectiveness of the ad, and partial credit when the effectiveness of the ad [was] only reduced.” The advertisement contract contained identical language. No one has asserted or proved that the effectiveness of the advertisement was reduced or destroyed.

In 1998, Strategic and Brighton entered into a Newspaper Advertising Billing Verification Services Agreement. Under this service agreement, Brighton assigned its rights to Strategic, and Strategic agreed to review the advertisements and the contract to determine if Brighton had been overcharged. In late 1998, Brighton complained for the first time to Knight-Ridder about overcharges.

Strategic filed a one count complaint against the Miami Herald and Knight-Ridder. It claimed $75,000 in overcharges between 1994 and 1996 and $8,681.97 in 1997. Knight-Ridder raised various affirmative defenses including waiver, estoppel and substantial performance. Knight-Ridder admitted having reduced all black and white page images between the relevant time period of this lawsuit, 1994 through 1997. The trial court found that it was standard practice in the newspaper publishing industry to reduce image size on a page. The images in the Miami Herald were all reduced to meet press/production requirements to ensure that a quality newspaper was printed. The percentage of reduction was approximately 3.83%, a reduction that was only noticeable if measured with a ruler.

Knight-Ridder continues to reduce the black and white page images and Brighton continues to pay the same price for the advertisements it claims is an overcharge. Brighton justifies its continued payments by arguing that the Miami Herald is the only major newspaper in town and that, as a home developer, it needs to advertise in the newspaper. Brighton, however, does not complain about overcharges incurred after it discovered the image size reduction.

This is a clear case for the application of the doctrine of substantial performance. “Substantial performance is performance ‘nearly equivalent to what was bargained for.’ ” *Pullam v. Hercules Inc.*, 711 So.2d 72, 75 (Fla. 1st DCA 1998).

Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages may have been occasioned him by the promisee's failure to render full performance.

O*cean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971). For six years, Knight-Ridder ran the advertisements without any complaint from Brighton. Brighton never requested tear sheets or advertising proofs before publication, nor did it measure the advertisements after publication. The size reduction was not easily discernible, even in a side-by-side comparison. Brighton thus received the benefit of its bargain. Even after discovering the reduction, it continued its business relationship with Knight-Ridder, using the same advertisements under the same terms and conditions.

Strategic makes two arguments as to why the doctrine of substantial performance is not applicable. First, it asserts that the doctrine does not apply to the payment of money, citing to *Rose v. Ditto*, 804 So.2d 351, 353 (Fla. 4th DCA 2001) (“There is almost always no such thing as ‘substantial performance’ of payment between commercial parties when the duty is simply the general one to pay.”) and *Enriquillo Export & Import, Inc. v. M.B.R. Indus., Inc.*, 733 So.2d 1124, 1127 (Fla. 4th DCA 1999). This argument incorrectly places the focus of the parties' transaction upon Brighton's obligation to compensate Knight-Ridder. The focus instead is on Knight-Ridder's responsibility to print a newspaper advertisement that substantially complies with what Brighton bargained for.

Second, Strategic argues that pursuant to *National Constructors, Inc. v. Ellenberg*, 681 So.2d 791, 793 (Fla. 3d DCA 1996), the doctrine is inapplicable where the breach of contract was willful or intentional. “In the context of contracts for construction, the doctrine of substantial performance is applicable only where the contractor has not willfully or materially breached the terms of his contract or has not intentionally failed to comply with the specifications.” *Id.* at 793. While Knight-Ridder intentionally reduced the size of the advertisements, it did not intentionally breach the contract. It relied on contractual language which authorized it “to revise, alter or reject any advertisement.” We agree that, although the better business practice would have been to notify its customers of the size reduction, a reduction to which Brighton obviously would have consented, we conclude that the trial court correctly granted summary judgment.

The trial court's thoughtful and detailed fourteen page order also found that Brighton had waived any defect in Knight-Ridder's performance. Although we find the trial court's reasoning persuasive, we need not reach this ground given our conclusion that Knight-Ridder substantially performed its contractual obligations.

Affirmed.

C. Substantial Performance Doctrine Not Applied for Simple Payment of Money

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HUFCOR/GULFSTREAM, INC. v. HOMESTEAD CONCRETE & DRAINAGE, INC.

District Court of Appeal of Florida, Fourth District, 2002

831 So. 2d 767

STEVENSON, J.

This case involves a contractual dispute between appellant, Hufcor/Gulfstream, Inc. (Hufcor), and appellees, Homestead Concrete & Drainage, Inc., and North American Speciality Insurance Company (collectively Homestead), which was settled by an agreement calling for the entry of a judgment upon default. Hufcor appeals the trial court's failure to strictly enforce the terms of the agreement upon appellees' default. We find merit in Hufcor's challenge and reverse.

The City of Homestead, Florida, contracted with Homestead to act as its general contractor on a public construction project. North American was the surety for the project. Homestead subcontracted a portion of the construction project to Hufcor. Hufcor subsequently filed suit against Homestead, alleging that it was owed monies for work performed pursuant to the terms of the parties' contract, which Homestead failed to pay.

The parties attended mediation and were able to reach an agreement to their dispute. Under the agreement, Hufcor agreed to forego collecting the full $86,000 owed by Homestead and instead settle for $75,000, provided the payments were made pursuant to an agreed schedule. If the payments were not received when due, the agreement provided that Hufcor could give written notice of late payment. If the payment was not received within five days of the written notice, an agreed final judgment in the amount of $86,000, less the amounts paid, would be entered against Homestead. The agreement made time of the essence.

Homestead timely tendered the first two payments totaling $60,000. The third and final payment of $15,000 was to be delivered to Hufcor by November 27, 2001. Homestead failed to make this payment, and on November 29, 2001, Hufcor's attorney sent written notice of the late payment. On December 17, 2001, some eighteen days after the written notice was sent, Homestead made the third payment of $15,000. Later, Hufcor filed a motion for final judgment pursuant to the agreement, seeking a judgment of $26,000 ($86,000 less the amount paid, $60,000). After a hearing, the court awarded Hufcor $15,000, the amount that was tardily tendered. We find that the trial court erred in failing to enter judgment as agreed by the parties.

"It is well settled in this state that '[a] stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court.' " *Johnson v. Johnson*, 663 So.2d 663, 664-65 (Fla. 2d DCA 1995) (*quoting Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1, 4 (Fla.1971)); *see also Treasure Coast, Inc. v. Ludlum Constr. Co.*, 760 So.2d 232 (Fla. 4th DCA 2000). A settlement agreement should be strictly enforced where time is made of the essence, *Rose v. Ditto*, 804 So.2d 351 (Fla. 4th DCA 2001), the terms are otherwise clear and unambiguous, *BMW of N. Am., Inc. v. Krathen*, 471 So.2d 585, 587 (Fla. 4th DCA 1985); *Nanci S. Landy, P.A. v. Empire Marble & Granite, Inc.,* 762 So.2d 954 (Fla. 3d DCA 2000), and no grounds for rescission or withdrawal are shown. See Johnson, 663 So.2d at 665.

The agreement expressly provided that "Time is strictly of the essence of this Stipulation for Judgment." An attempted performance in the form of a late payment does not cure the default where time is made of the essence in the agreement. Where the debtor agrees to pay the creditor on or before a specific date, time is of the essence, and the debtor is required to deliver money to the creditor on or before that date. *See Enriquillo Export & Import, Inc. v. M.B.R. Indus., Inc.*, 733 So.2d 1124 (Fla. 4th DCA 1999). "There is almost always no such thing as 'substantial performance' of payment between commercial parties when the duty is simply the general one to pay. Payment is either made in the amount and on the date due, or it is not." *Id.* at 1127.

Hufcor agreed to forbear its pending action so long as Homestead made the payments in accordance with the parties' bargained-for agreement. Time was made of the essence and the terms were clear and unambiguous. Although we concede that the result seems harsh, since payment was not received within the grace period following the notice of default, Hufcor was entitled to a judgment of $26,000 ($86,000 less the amount paid, $60,000). Accordingly, we reverse and remand with directions that a judgment be entered in favor of Hufcor in the amount of $26,000, together with entitlement to interests, costs and fees as provided for in the agreement.

REVERSED and REMANDED.

WARNER and TAYLOR, JJ., concur.

Note

State laws often provide protections to construction workers, artisans and other services providers by creating a right of sale in some object to which such workers, artisans or services providers add value. The most common examples include a lien on one's house to ensure payment to a roofer or a lien on an automobile that a mechanic has fixed. There are statutory notice and filing requirements that must be carefully followed to create and to preserve these rights, which are rights in the "collateral" that permit a sale of the collateral in the case that the debtor refuses to pay. In this, mechanic's liens are just like mortgages – if someone fails to pay their mortgage (in a mortgage theory jurisdiction, it may be important to add), then the creditor who hold the mortgage (or lien) may require the sale of the property in order to be paid. If the sales price is greater than the debt owed plus expenses of the sale, then the remainder must be returned to the defaulting debtor. If the sales price falls short, it is often possible for the creditor to obtain a *deficiency judgment* to cover the shortfall. *See* Chapter 8, Section 3, Note 3 for more information on mechanic's liens.

Problem 18-1

Buyer and Seller have been contracting with each other for years. Buyer sent to Seller a purchase offer to buy 1,000 widgets, of a type that Seller has manufactured for years, in the next year. Other than this, the purchase offer included a clause that risk of loss as the goods were in transit had to be covered by Buyer's insurance. In the past, Buyer had always ordered widgets without setting a delivery date, and Buyer would just call Seller within the year to solidify the delivery and shipping arrangements. Recently, Buyer found a new supplier of widgets that were much cheaper that Seller's price. Buyer informed Seller that there was no agreement because there was no written delivery term, and that there was no price term. After discussion, Buyer agreed to consider Seller's promise to reduce the price a little, but only if Seller's insurance covered the risk of loss during transport. Is there a binding agreement between Buyer and Seller? If so, what are the delivery, the price, and the insurance-during-transport provisions? Is there more than one source for implication?

Problem 18-2

Painter agreed to complete the painting of Homeowner's house by the end of June. Due to a host of other painting jobs and lack of assistants, Painter was two days late in completing the painting. (As it turns out, Homeowner was not really in any specific hurry to have the paining completed – he just wanted to keep the money). Homeowner refuses to pay. If Painter sues to enforce the contract, what is the likely result and why? What if it was not Painter, but Paint Seller, and Paint Seller contracted to supply Homeowner a specific paint no later than by the end of May, and Paint Seller was only able to supply the paint on July 2? Would the result be different for a breaching services provider than for a sale-of-goods party?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 18

(42) Various situations where contractual terms may be implied, and the limitation on a court's ability to imply conditions as a matter of law

(43) Substantial performance and its prohibition, by the perfect tender rule, for sale-of-goods transactions

(44) The difference between implied-in-law gap fillers, such as the duties of good faith and fair dealing (this Chapter), and interpretation of ambiguous terms, sometimes in careful ways that avoid forfeiture (Chapter 14)

SUGGESTED EXERCISE(S)

1. Consider the citation in the *Casale* case to sections in the FLA. J. CONTRACTS. Are there Florida cases that could be used instead? Would it matter, based on the hierarchical importance of legal precedent?

CHAPTER 19: ASSORTED IMPLIED IN LAW CONTRACTUAL TERMS IN SALE-OF-GOODS CASES

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The last Chapter addressed implied-in-law *conditions*, such as the duty of good faith and observing commercially reasonable standards of fair dealing. Sometimes a thing being implied in a contractual setting is a condition. Other times, the thing being implied as a *gap filler* is a contractual *term*. Whereas failure of condition prevents a duty from arising or cutting off one that has already arisen, the breach of a contractual term entitles the non-breaching party to redress, which can range from a cure of the breach all the way up to compensatory damages or even equitable remedies. There are a host of gap fillers contained in Article 2 of the Uniform Commercial Code, which most if not all states have adopted into their own legislation. Contractual parties often do not dot every 'i' nor do they cross every 't' when they contract. Once the main terms are agreed, the parties either rely on past dealings to fill in the gaps, or agree to agree at a later date. For example, a steel mill may order thousands of tons of iron ore on a yearly basis, but put in requests for delivery at times when its on-site stock of ore is running low. (In other words, the parties agree that the buyer will provide delivery dates on a rolling basis). As was considered in Chapter 4, the lack of exact delivery dates is probably not the kind of thing that indicates a lack of formation. The law would step in to imply that both the orders, and the deliveries, be made within a reasonable time. In fact, even when terms are missing to a contractual agreement but the parties have begun performance, a court could "cobble together" the

agreement using the terms on which the parties agreed together with implied terms (this was addressed in Chapter 18).

Parties may avoid the implication of terms and conditions by careful drafting of valid contractual clauses.

The concepts in this Chapter tend to be either the kind that are to be "gleaned" rather than covered, or are the subject of more advanced Commercial Transactions courses.

1. Freedom of Contract

CITY OF POMPANO BEACH 5. BEATTY

District Court of Appeal of Florida, Fourth District, 2017

222 So. 3d 598

Hanzman, Michael A., Associate Judge.

1. INTRODUCTION

On May 1, 1974, Appellee, Nancy C. Beatty (and her husband William K. Beatty), as lessors, and Daniel L. Garnsey, as lessee, entered into a ninety-nine-year lease encumbering real property located in Broward County. In October 1989, Appellant, the City of Pompano Beach, assumed the lessee's interest. The lease required specified rental payments for years one through five, with increases after the fifth year based on the cost of living index commencing "on the first (1st) day of the 61st month of the basic term of this Lease, and on every 37th month thereafter." The contract also provided that:

> Rental payments shall be subject to reappraisal every twenty (20) years by independent MAI of land and improvements at the option of the Lessors and at their expense to show return of 12% of land value, and 6% of improvements but in no event less than rental payment for the 19th year, 39th year, and 59th year, etc.

(Emphasis added).

Appellees first sought to exercise this reappraisal option in 2006—the thirty-third (33) year of the lease term. Based upon this reappraisal, Appellees then demanded increased rent. When Appellant failed to accede to this demand, Appellee filed suit for breach of contract. Appellant, as an affirmative defense, predictably insisted that the property was subject to reappraisal only in years

twenty, forty, sixty, and eighty and, as a result, it was not in breach for failing to pay increased rent based upon a reappraisal that was done in year thirty-three.

Appellant eventually moved for summary judgment based upon what it maintained was the clear and unambiguous language of section 2.2(e) of the lease. Appellees cross-motioned on the identical issue, arguing they were entitled to a rent increase because a first reappraisal was permitted at any time so long as twenty years had elapsed from the date the lease was executed (1974), and successive reappraisals were permitted so long as twenty years had elapsed since the most recent reappraisal.

The trial court granted the Appellees' motion, agreeing with their interpretation of the contract. We do not, and conclude that § 2.2(e) of the lease clearly and unambiguously granted the lessor a right to reappraise the property at specified dates, and only those dates. We therefore reverse.

2. ANALYSIS

As this court has said before, "contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So.3d 989, 993 (Fla. 4th DCA 2014). That freedom is indeed a constitutionally protected right. *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 252–53, 27 S.Ct. 126, 51 L.Ed. 168 (1906); *Hoffman v. Boyd*, 698 So.2d 346, 348 (Fla. 4th DCA 1997). And when parties choose to agree upon certain terms and conditions of their contract, it is not the province of the court to second-guess their wisdom or "substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach,* 274 So.2d 29, 30–31 (Fla. 3d DCA 1973). Rather, the court's task is to apply the parties' contract as written, not "rewrite" it under the guise of judicial construction. *Gulliver Schs., Inc. v. Snay*, 137 So.3d 1045, 1047 (Fla. 3d DCA 2014) ("Where contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning.") (*quoting Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A.*, 771 So.2d 628, 631 (Fla. 4th DCA 2000)); Pol v. Pol, 705 So.2d 51, 53 (Fla. 3d DCA 1997) ("[A] court cannot rewrite the clear and unambiguous terms of a voluntary contract.").

The contract here could not be clearer. First, it says that the property is subject to reappraisal "every twenty years," not any time the lessor desires "so long as" twenty years has passed since inception or a prior appraisal. And if that were not enough, it specifies that a reappraisal may not result in a rental obligation "less than [the] rental payment for the 19th year, 39th year, 59th year, etc."—not less than the rental payment for the year "prior to

reappraisal," whatever year that may be. Thus, reading this provision as a whole we have no difficulty concluding that it clearly and unambiguously permits reappraisal only at years twenty, forty, sixty, and eighty.[1]

Although the clarity of the provision in dispute ends the analysis, we also point out that Appellees' tortured "interpretation" amounts to a rewrite of the lease on terms significantly more favorable to the lessor only. At the time this contract was entered into, neither party knew—or had any way to predict—what the condition of the real estate market would be at the time reappraisal was authorized (i.e., years twenty, forty, sixty, and eighty). So a reappraisal might benefit the lessor and it might not. The parties would simply have to accept the "market" as they found it. But under Appellees' "interpretation" they could sit back and exercise the reappraisal option whenever the market would benefit them the most, so long as twenty years had elapsed since the execution of the lease. So if the market was weak in year twenty (or forty, sixty, or eighty), Appellees could just accept the cost of living increases, wait for the market to rise, and then—at the most opportune time—elect to reappraise. Of course if the market was strong in years twenty, forty, sixty, and eighty, the lessee would have no corresponding right to delay reappraisal.

The bottom line is that Appellees' interpretation gives it something the contract does not—an "option" to reappraise when—in its view—to do so would be most advantageous. We will not sanction such a one way judicial re-write.

The trial court's final judgment in favor of Appellees is reversed with directions to enter final judgment in favor of Appellant. Given our reversal of the final judgment, we likewise reverse the final judgment awarding Appellees' attorney's fees and costs. *See City of Hollywood v. Witt*, 939 So.2d 315, 319 (Fla. 4th DCA 2006) ("[W]here an award of attorney's fees is dependent upon the judgment obtained, the reversal of the underlying judgment necessitates the reversal of the fee award").

Reversed and remanded.

Damoorgian and Ciklin, JJ., concur.

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[1] Nor is the provision ambiguous simply because the litigants ascribe different meanings to the language employed—something that occurs every time the interpretation of a contract is litigated. Incorrect and even absurd interpretations of unambiguous contracts are often advanced in these types of disputes. But a true ambiguity exists only when the language at issue "is reasonably susceptible to more than one interpretation." *Lambert v. Berkley S. Condo. Ass'n*, 680 So.2d 588, 590 (Fla. 4th DCA 1996); *Campaniello v. Amici P'ship*, 832 So.2d 870, 872 (Fla. 4th DCA 2002) ("[W]hen the terms of a written instrument are disputed and

rationally susceptible to more than one construction, an issue of fact is presented ...."); *Am. Med. Int'l, Inc. v. Scheller*, 462 So.2d 1, 7 (Fla. 4th DCA 1984) ("[F]anciful, inconsistent, and absurd interpretations of plain language are always possible. It is the duty of the trial court to prevent such interpretations.").

Notes

57. Freedom of contract is a *constitutionally protected* right. Accordingly, one would think that cases concerning constitutional rights would reach the Florida Supreme Court. They have. *See, e.g., City of Largo v. AHF-Bay Fund, LLC*, 215 So. 3d 10, 16 (Fla. 2017) ("[f]reedom of contract is the general rule … it is a matter of great public concern that freedom of contract be not lightly interfered with"). The *City of Pompano Beach* case is more readable and more directly relevant to the nature of the topics addressed in this Chapter.

58. We included rather than excised the second and third paragraphs of the Section 2 Analysis and footnote 1 of the *City of Pompano Beach* case for a reason. This should remind of information to have been learned from Chapter 14 on contract interpretation. "Repetition is the mother of learning, the father of action, which makes it the architect of accomplishment." Zig Ziglar.

59. You should see significant overlap with Chapter 4 gap fillers, Chapter 14 interpretation, Chapter 17 conditions, and Chapter 18 implied-in-law conditions. Reconciling how all of these work together indicates a mastery of contract law and is a lifesaver on bar exams and beyond.

CMM Approach: Never to be forgotten is one of contract law's golden rules: parties generally enjoy freedom of contract. Thus, unless something is illegal, against public policy, or somehow truly unfair, parties are allowed to contract for just about anything as part of their contractual dealings so long as assumption of the risk is clear and the special terms are known and understood. Also recall from Chapter 18 that implied terms cannot trump (valid) express terms. To the extent that a contracting party does not like the kinds of implied terms or conditions that courts can make part of their dealings, such party may avoid the implication of disfavored terms and conditions by carefully drafting of (valid) provisions in line with his, her, or its wishes.

A word of caution is in order. Sometimes, over-drafting of terms can lead to interpretation and construction opportunities that a client would not favor, and not to be forgotten is the rule of construing ambiguous terms against the

drafter (addressed in Chapter 14). In a favorable legal and commercial environment, a court's implication of a term or condition may be preferable to the interpretation given to a poorly worded contractual clause.

2. Examples of Implied Terms in Sale-of-Goods Cases

Article 2 of the Uniform Commercial Code and the state laws adopting it contains a fair number of gap-filling terms, which are in addition to those that may be implied in fact based on the facts and circumstances (often, from prior dealings or industry-wide practices). Considered in this light, are they implied in fact or implied in law? Some are relatively common and therefore relatively familiar. Due to its importance, the first to be addressed is the *perfect tender rule*. Note that contractual parties could in fact change this rule to something else if they do so by contract. Other implied terms are not as common, and this is the focus of this Section B – to explore implied terms (not conditions, from this point) that are not as common but are nevertheless important for transactional lawyers and contracts drafters to know.

There are actually very few reported Florida appellate cases addressing the standard for breach of contract by the seller where they do, it is usually some non-conformity with the terms of the parties' agreement. Because the concept is so important, and at the risk some repetition, we include the *Jaregui* case excerpt, which was also included in Chapter 18.

A. The Perfect Tender Rule

Exactly like U.C.C. § 2-601, FLA. STAT. § 672.601 (2017) provides as follows:

> **672.601 Buyer's rights on improper delivery.**
>
> Subject to the provisions of this chapter on breach in installment contracts (s. 672.612) and *unless otherwise agreed under the sections on contractual limitations of remedy* (§§ 672.718 and 672.719), if the goods or the tender of delivery *fail in any respect to conform to the contract*, the buyer may:
>
> (1) Reject the whole; or
>
> (2) Accept the whole; or
>
> (3) Accept any commercial unit or units and reject the rest.

(Emphasis added.)

JAREGUI v. BOBB'S PIANO SALES AND SERVICE, INC.

District Court of Appeal of Florida, Third District, 2006

922 So. 2d 303

SCHWARTZ, Senior Judge.

The plaintiff purchased a piano from the defendant which was represented to be in new condition but was delivered with unacceptable damage. He appeals from the judgment of a successor judge vacating a judgment [footnote omitted] of his predecessor in plaintiff's favor for the return of the purchase price from the defendant (and that of the piano to the defendant) and found instead that he had sustained no recoverable damages. [Footnote omitted]

* * *

2.

Second, and more important, the judgment on review was erroneous as a matter of law. It is based on the rationale that because, even in its defective condition, the piano was worth as much or more than plaintiff actually paid, no actionable damages had been sustained for breach of the contract for purchase and sale. *See Carter Hawley Hale Stores, Inc. v. Conley*, 372 So.2d 965 (Fla. 3d DCA 1979). It is the law, however, as reflected in the judgment rendered by the actual trial judge, that, in a case such as this one, the purchaser of non-conforming goods like the offending piano retains the option to claim either the difference in value or, as plaintiff clearly did in this case, in effect, to cancel the deal and get his money back. See §§ 672.711, .714, Fla. Stat. (2005*); Fryatt v. Lantana One, Ltd.*, 866 So.2d 158 (Fla. 1st DCA 2004); *Winterbotham v. Computer Corps, Inc.,* 490 So.2d 1282 (Fla. 5th DCA 1986); *Royco, Inc. v. Cottengim*, 427 So.2d 759 (Fla. 5th DCA 1983), *review denied*, 431 So.2d 989 (Fla.1983); *Carter Hawley Hale Stores, Inc.*, 372 So.2d at 965; *see also Music Acceptance Corp. v. Lofing*, 32 Cal.App.4th 610, 39 Cal.Rptr.2d 159 (1995)(applying rule to delivery of defective piano). This principle is based on the common sense idea that the purchaser is entitled to receive what he wanted to buy and pay for and that the seller is not free to supply any non-conforming item she wishes just so long as the deviant goods are worth just as much. See §§ 672.106(2), .601, .608, Fla. Stat. (2005); *Barrington Homes of Fla., Inc. v. Kelley*, 320 So.2d 841 (Fla. 2d DCA 1975). The initial judgment properly reflects this ethic and is therefore reinstated. [Footnote omitted]

* * *

B. Risk of Loss

The Uniform Commercial Code and states that have adopted it include special risk-of-loss terms in the case that buyers and sellers are using carriers for transport. Much can go wrong in transport, when the goods are also often in the hands of a third party for safekeeping and delivery. (Does a contract for shipping create a third party beneficiary? If a seller contracts with a shipper for shipping, is the buyer a third party beneficiary of that agreement?). Contractual parties are free to contract over which party bears the risk of loss, who pays for insurance, etc. However, where parties fail to include a provision covering the risk of loss in transit, the Code and the state laws based thereon imply the following terms.

(1). In Cases With No Breach

§ 2-509. Risk of Loss in the Absence of Breach.[45]

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

* * *

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on her or his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this chapter on sale on approval (§ 672.327) and on effect of breach on risk of loss (§ 672.510).

45

To get your mind around code language, you may want to write labels next to the above-quoted subsections as follows: (1) shipment contract, (2) destination contract, (3) special merchant provision, and (4) only if not otherwise provided. As noted earlier, parties are free to assign risk and similar.

LADEX CORP. v. TRANSPORTES AEREOS NATIONALES, S.A.

District Court of Appeal of Florida, Third District, 1985

476 So. 2d 763

NESBITT, Judge.

Ladex Corporation (Ladex) appeals a final summary judgment entered in favor of the defendants, Transporte Aereos Nacionales, S.A. (TAN) and Cole Transport, Inc. (Cole). We reverse.

The present litigation arose out of a contract between Ladex and Santeri Fisheries de Hondouras, S.A. (Santeri). The contract concerned 175 cartons of frozen shrimp that Ladex agreed to buy from Santeri. The shrimp were delivered by Santeri to TAN, the air carrier, and an air waybill was issued. The shrimp arrived at Miami International Airport and were transported to a Cole truck for delivery to Ladex's warehouse. Although the facts are somewhat sketchy on the record before us, we perceive that the truck containing the shipment of shrimp was hijacked while still in the loading area of the airport.

Ladex presented a claim to its insurer, Aetna Insurance Company (Aetna), for $37,328.50, the amount stated on the invoice from Santeri. Aetna issued a check for the amount, Ladex executed a loan and trust receipt, and Aetna instituted the litigation as Ladex's subrogee against TAN and Cole, the carriers, seeking recovery of $37,328.50. TAN moved for summary judgment arguing that the discovery deposition of Rafael Armada, representative of Ladex, disclosed that Ladex never paid Santeri for the shrimp and, therefore, suffered no loss and has no right to any recovery. Cole joined in TAN's motion for summary judgment at the hearing. Following the hearing, the trial court entered summary final judgment in favor of TAN and Cole, finding that Ladex "did not suffer any loss or damage" because it "never paid its supplier for the shipment."

It is generally held that a prima facie case in an action for damages against a carrier requires proof of delivery to the carrier in good condition; arrival in damaged condition or nondelivery; and finally, damages. *See Missouri Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134, 138, 84 S.Ct. 1142, 1144, 12 L.Ed.2d 194 (1964). The present appeal involves the element of damages. TAN and Cole argue, as they did in the trial court, that since Ladex never paid

Santeri for the shipment, Ladex has sustained no loss and, thus, no damages. We disagree.

Contrary to the carriers' arguments on appeal, whether or not Ladex had title to the shrimp at the time they were hijacked is all-important. If, in fact, Ladex had title to the shrimp when the shipment was stolen, it sustained damages by way of the loss of its property. Whether or not Ladex paid Santeri for the shrimp and whether or not Santeri chooses to sue Ladex for any amount due, are issues not relevant to the present litigation. [Footnote omitted] The invoice from Santeri is simply evidence of the value of the shrimp and, thus, the damages sustained. What this case does turn on is whether the agreement between Ladex and Santeri amounted to a shipment contract or a destination contract. *See* §§ 672.319–.320, Fla.Stat. (1981); *Pestana v. Karinol Corp.*, 367 So.2d 1096 (Fla. 3d DCA 1979).

A shipment contract is regarded as the normal contract where the seller is required to send the goods by carrier to the buyer but is not required to guarantee delivery at a particular location. *Pestana*, 367 So.2d at 1099. A C.1.F. or C. & F. contract is a shipment contract. *See* U.C.C. § 2–320 comment 1 (1978). In the normal shipment contract, the title to the goods and the risk of loss passes to the buyer when the goods are properly delivered to the carrier for shipment to the buyer. § 672.509(1)(a), Fla.Stat. (1981); U.C.C. § 2–320 comment 1 (1978); *Pestana*, 367 So.2d at 1099.

On the other hand, a destination contract is regarded as the variant type of contract in which the seller agrees to deliver the goods to the buyer at a particular destination and to bear the risk of loss until tender of delivery. § 672.509(1)(b), Fla.Stat. (1981); U.C.C. § 2–503 comment 5 (1978); *Pestana*, 367 So.2d at 1099. It follows that title to the goods remains in the seller at least through tender of the goods at the specified destination. A destination contract can be made by express provision in the sales contract or by the use of delivery terms such as “F.O.B. [destination].” *Pestana*, 367 So.2d at 1099. *See* § 672.319, Fla.Stat. (1981). It should be pointed out, however, that the parties must specifically agree to a destination contract, otherwise the contract will be considered a shipment contract. *Pestana*, 367 So.2d at 1099. *See* U.C.C. § 2–503 comment 5 (1978). *See also* 9 Fla.Jur.2d Carriers § 87 (1979).

All parties rely upon Armada's deposition testimony. Ladex points to Armada's specific testimony indicating that the contract between Ladex and Santeri was C.1.F. [Footnote omitted] In addition, Ladex's position is aided by the presumption that the contract is a shipment contract unless the terms of a destination contract have been specifically agreed to by the parties. *See Pestana*, 367 So.2d at 1099; U.C.C. § 2–503 comment 5 (1978); 9 Fla.Jur.2d Carriers § 87 (1979). If the invoice from Santeri and the air waybill, which

contain no terms relevant to the issue, were the only evidence as to the terms of the contract, it would be deemed a normal shipment contract. *See Pestana*.

Cole argues, however, that Armada's deposition testimony indicates that the actual terms of the agreement were F.O.B. Ladex's warehouse in Miami. Although the testimony does tend to indicate that such was the course of dealing between Ladex and Santeri in the past, and there are some indications that the present agreement was no different, the argument is hard pressed in the face of Armada's specific testimony that the contract was C.1.F. We recognize that C.1.F. and F.O.B. contracts are not necessarily mutually exclusive of each other [footnote omitted] and that the effect of nearly any provision of the Uniform Commercial Code, ch. 671–79, Fla.Stat. (1981), may be varied by agreement. *See* § 671–102(3), Fla.Stat. (1981). Accordingly, we find Cole's better argument on the record before us is that in the dealings between Ladex and Santeri, including the present one, the term C. & F. [footnote omitted] was used but the parties agreed that Santeri would retain title to the shrimp (and the risk of loss) until the shipment was delivered to Ladex's refrigerated warehouse in Miami. Of course, this would require specific evidence as to the intention of the parties. As pointed out in the official comments to the Uniform Commercial Code, however, the dominant parameters of the C.1.F. and C. & F. terms are so well understood commercially that, whenever reasonably possible, any variation should be read as falling within those parameters, rather than as destroying the whole meaning of the term which essentially indicates a contract for proper shipment rather than one for delivery at a destination. U.C.C. § 2–320 comment 14 (1978).

We find that the record before this court has not been sufficiently developed so that a determination can be made as a matter of law as to who had title to the shrimp when they were stolen. Factual issues remain as to what type of contract existed between Ladex and Santeri and who had title to the shrimp and the risk of loss at the time of the hijacking. If, in fact, Ladex had title at the time in question then it did sustain damages by way of the loss of its property.

Accordingly, the summary judgment under review is reversed and the cause is remanded for further proceedings.

PESTANA v. KARINOL CORP.

District Court of Appeal of Florida, Third District, 1979

367 So. 2d 1096

HUBBART, Judge.

This is an action for damages based on a contract for the sale of goods. The defendant seller and others prevailed in this action after a non-jury trial in the Circuit Court for the Eleventh Judicial Circuit of Florida. The plaintiff buyer appeals.

The central issue presented for review is whether a contract for the sale of goods, which stipulates the place where the goods sold are to be sent by carrier but contains (a) no explicit provisions allocating the risk of loss while the goods are in the possession of the carrier and (b) no delivery terms such as F.O.B. place of destination, is a shipment contract or a destination contract under the Uniform Commercial Code. We hold that such a contract, without more, constitutes a shipment contract wherein the risk of loss passes to the buyer when the seller duly delivers the goods to the carrier under a reasonable contract of carriage for shipment to the buyer. Accordingly, we affirm.

A

The critical facts of this case are substantially undisputed. On March 4, 1975, Nahim Amar B. (the plaintiff Pedro P. Pestana's decedent herein) who was a resident of Mexico entered into a contract through his authorized representative with the Karinol Corporation (the defendant herein) which is an exporting company licensed to do business in Florida and operating out of Miami. The terms of this contract were embodied in a one page invoice written in Spanish and prepared by the defendant Karinol. By the terms of this contract, the plaintiff's Amar agreed to purchase 64 electronic watches from the defendant Karinol for $6,006. A notation was printed at the bottom of the contract which, translated into English, reads as follows: “Please send the merchandise in cardboard boxes duly strapped with metal bands via air parcel post to Chetumal. Documents to Banco de Commercio De Quintano Roo S.A.” There were no provisions in the contract which specifically allocated the risk of loss on the goods sold while in the possession of the carrier; there were also no F.O.B., F.A.S., C.1.F. or C & F terms contained in the contract. *See* §§ 672.319, 672.320, Fla. Stat. (1977). A 25% Downpayment on the purchase price of the goods sold was made prior to shipment.

On April 11, 1975, there is sufficient evidence, although disputed, that the defendant Karinol delivered the watches in two cartons to its agent American International Freight Forwarders, Inc. (the second defendant herein) for forwarding to the plaintiff's decedent Amar. The defendant American insured the two cartons with Fidelity & Casualty Company of New York (the third defendant herein) naming the defendant Karinol as the insured. The defendant American as freight forwarder strapped the cartons in question with metal bands and delivered them to TACA International Airlines consigned to one Bernard Smith, a representative of the plaintiff's decedent, in Belize City,

Belize, Central America. The shipment was arranged by Karinol in this manner in accord with a prior understanding between the parties as there were no direct flights from Miami, Florida to Chetumal, Mexico. Mr. Smith was to take custody of the goods on behalf of the plaintiff's decedent in Belize and arrange for their transport by truck to the plaintiff's decedent Amar in Chetumal, Mexico.

On April 15, 1975, the cartons arrived by air in Belize City and were stored by the airline in the customs and air freight cargo room. Mr. Smith was duly notified and thereupon the plaintiff's decedent made payment on the balance due under the contract to the defendant Karinol. On May 2, 1975, Mr. Smith took custody of the cartons after a certain delay was experienced in transferring the cartons to a customs warehouse. Either on that day or shortly thereafter, the cartons were opened by Mr. Smith and customs officials as was required for clearance prior to the truck shipment to Chetumal, Mexico. There were no watches contained in the cartons. The defendant Karinol and its insurance carrier the defendant Fidelity were duly notified, but both eventually refused to make good on the loss.

The plaintiff Pedro P. Pestana, as representative of the Estate of Nahim Amar B., deceased, filed suit against the defendant Karinol as the seller, the defendant American as Karinol's agent freight forwarder, and the defendant Fidelity as the defendant Karinol's insurer. The complaint alleged that the defendant Karinol entered into a contract to ship merchandise from Miami, Florida to Chetumal, Mexico with the plaintiff's decedent, that the defendant American as freight forwarder and agent of the defendant Karinol accepted shipment of such merchandise, that the merchandise was lost, stolen or misplaced while in the care and custody of the defendant Karinol and the defendant American, that the defendants Karinol and American failed to make delivery to the plaintiff's decedent at Chetumal, Mexico, and that there existed a liability policy with the defendant Fidelity for the benefit of the plaintiff's decedent. The complaint sought damages together with court costs and reasonable attorneys fees. All the defendants duly filed answers to the complaint wherein liability was denied. The defendant Karinol filed a cross-complaint against the defendant American. The trial court after a non-jury trial found for all of the defendants in this cause. This appeal follows. [Footnote omitted]

B

There are two types of sales contracts under Florida's Uniform Commercial Code wherein a carrier is used to transport the goods sold: a shipment contract and a destination contract. A shipment contract is considered the normal contract in which the seller is required to send the subject goods by carrier to the buyer but is not required to guarantee delivery thereof at a particular destination. Under a shipment contract, the seller, unless otherwise

agreed, must: (1) put the goods sold in the possession of a carrier and make a contract for their transportation as may be reasonable having regard for the nature of the goods and other attendant circumstances, (2) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of the trade, and (3) promptly notify the buyer of the shipment. On a shipment contract, the risk of loss passes to the buyer when the goods sold are duly delivered to the carrier for shipment to the buyer. §§ 672.503 (Official U.C.C. comment 5), 672.504, 672.509(1), Fla. Stat. (1977); *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F.Supp. 550, 557 (D.C.Conn.1968); *Eberhard Manufacturing Co. v. Brown*, 61 Mich.App. 268, 232 N.W.2d 378 (1975).

A destination contract, on the other hand, is considered the variant contract in which the seller specifically agrees to deliver the goods sold to the buyer at a particular destination and to bear the risk of loss of the goods until tender of delivery. This can be accomplished by express provision in the sales contract to that effect or by the use of delivery terms such as F.O.B. (place of destination). Under a destination contract, the seller is required to tender delivery of the goods sold to the buyer at the place of destination. The risk of loss under such a contract passes to the buyer when the goods sold are duly tendered to the buyer at the place of destination while in the possession of the carrier so as to enable the buyer to take delivery. The parties must explicitly agree to a destination contract; otherwise the contract will be considered a shipment contract. §§ 672.319(1)(b), 672.503 (Official U.C.C. comment 5), 672.509(1), Fla. Stat. (1977); *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F.Supp. 550, 557 (D.C.Conn.1968); *Eberhard Manufacturing Corp. v. Brown*, 61 Mich.App. 268, 232 N.W.2d 378 (1975); White and Summers, Uniform Commercial Code 140-43 (1972).

Where the risk of loss falls on the seller at the time the goods sold are lost or destroyed, the seller is liable in damages to the buyer for non-delivery unless the seller tenders a performance in replacement for the lost or destroyed goods. On the other hand, where the risk of loss falls on the buyer at the time the goods sold are lost or destroyed, the buyer is liable to the seller for the purchase price of the goods sold. White and Summers, Uniform Commercial Code 134 (1972).

C

In the instant case, we deal with the normal shipment contract involving the sale of goods. The defendant Karinol pursuant to this contract agreed to send the goods sold, a shipment of watches, to the plaintiff's decedent in Chetumal, Mexico. There was no specific provision in the contract between the parties which allocated the risk of loss on the goods sold while in transit. In addition,

there were no delivery terms such as F.O.B. Chetumal contained in the contract.

All agree that there is sufficient evidence that the defendant Karinol performed its obligations as a seller under the Uniform Commercial Code if this contract is considered a shipment contract. Karinol put the goods sold in the possession of a carrier and made a contract for the goods safe transportation to the plaintiff's decedent; Karinol also promptly notified the plaintiff's decedent of the shipment and tendered to said party the necessary documents to obtain possession of the goods sold.

The plaintiff Pestana contends, however, that the contract herein is a destination contract in which the risk of loss on the goods sold did not pass until delivery on such goods had been tendered to him at Chetumal, Mexico an event which never occurred. He relies for this position on the notation at the bottom of the contract between the parties which provides that the goods were to be sent to Chetumal, Mexico. We cannot agree. A “send to” or “ship to” term is a part of every contract involving the sale of goods where carriage is contemplated and has no significance in determining whether the contract is a shipment or destination contract for risk of loss purposes. *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F.Supp. 550, 557-58 (D.C.Conn.1968); *Eberhard Manufacturing Co. v. Brown*, 61 Mich.App. 268, 232 N.W.2d 378 (1975). As such, the “send to” term contained in this contract cannot, without more, convert this into a destination contract.

It therefore follows that the risk of loss in this case shifted to the plaintiff's decedent as buyer when the defendant Karinol as seller duly delivered the goods to the defendant freight forwarder American under a reasonable contract of carriage for shipment to the plaintiff's decedent in Chetumal, Mexico. The defendant Karinol, its agent the defendant American, and its insurer the defendant Fidelity could not be held liable to the plaintiff in this action. The trial court properly entered judgment in favor of all the defendants herein.

Affirmed.

Notes

34. The *Ladex* case was distinguished on other grounds in a yet unpublished opinion: *Southern Recycling, LLC v. Gibbs International, Inc.* 2016 WL 1258402 (United States District Court, D. South Carolina, Spartanburg Division).

35. Can you think why a buyer might prefer a shipment contract, where it bears more risk? What if a buyer has things shipped to many

different ports. Could a buyer redirect a shipment before it reaches a final destination? Is buyer big enough to secure cheaper transit insurance than a seller would have to charge, especially if insurance charges are similar?

Problem 19-1

Client asks you to draft a contract for the purchase of engines manufactured overseas from Manufacturer. Both Client and Manufacturer have large insurance policies with reputable companies. To insure the engines during transport with their respective insurance carriers, each have to inform at least one week before shipment begins – it is a "rider" to their general insurance policies and there is a cost for every rider. Client has operations around the world, and prefers to be able to change the location of delivery even mid-ocean. What kind of shipping contract would you recommend, and who pays for the insurance? Might it different if there is a single port of destination and no option to change that destination?

(2). In Cases With Breach

§ 2-510. Effect of Breach on Risk of Loss.[46]

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

***IN RE* THOMAS**

United States Bankruptcy Court, S.D. Florida, 1995

182 B.R. 347

MEMORANDUM DECISION SUSTAINING DEBTOR'S OBJECTION TO CLAIM FILED BY SOUTHERN MARKEY, INC. d/b/a SUNKISSED POOLS

46

A. JAY CRISTOL, Chief Judge.

THIS CAUSE came on before the Court on April 12, 1995 for an evidentiary hearing on the Debtor's objection to the proof of claim filed by Southern Markey, Inc. d/b/a Sunkissed Pools, and upon the Claimant's response thereto, and the Court having observed the candor and demeanor of the witnesses, heard the testimony and examined the evidence submitted, considered the argument of counsel (and having requested the submission of simultaneous Memorandum Decisions within 10 days of this hearing and having fully considered same), the Court does hereby enter the following Memorandum Decision:

The Court finds the testimony of both the Debtor and of the President of Sunkissed Pools (hereinafter “Sunkissed”) to be credible. That testimony establishes that the parties had an oral agreement for the installation of a pool heater on the Debtor's premises. The President of Sunkissed testified that the price for this service was to be $4,000.00. The Debtor does not dispute this number, so the Court finds that this is the agreed upon price.

Further, the Debtor does not dispute that “a large unit” was placed outside her home on the driveway. However, the delivery slip submitted into evidence by Sunkissed is not signed by the Debtor, but by a “Nancy Thomas”. The Debtor testified she does not know a Nancy Thomas.

At this juncture the testimony collides. The Debtor testified that upon seeing that the unit had been placed in her driveway she called Sunkissed, advised them that the neighborhood was unsafe and that they needed to move the unit. She further testified that the unit was too large for her to personally move or secure. Finally, the Debtor testified that the unit stayed upon her driveway for approximately four days and when she found it missing and called the company to advise of same, she was told “not to worry”.

The President of Sunkissed testified that he did not know who signed for the unit; that no such phone calls were received from Mrs. Thomas; and that he returned to the premises the day after the delivery to install the unit and found it missing.

While these two conflicting views of the events that occurred are worrisome, they are not controlling or truly relevant to this Court's ruling. The real issue raised here, and which is controlling over whether Sunkissed Pools has a claim in this case, is whether the pool heater was “delivered” and who had the risk of loss at the time the pool heater disappeared.

At the onset the Court finds that the parties both contemplated that the Debtor was purchasing an “installed” pool heater as opposed to purchasing

just a pool heating unit. Accordingly, the Court finds that it is clear from the facts as presented, that “delivery”, in the legal sense, did not occur when the unit was placed on the Debtor's driveway. In a case very similar to the facts presented here, the Maryland Court of Appeals determined that where a buyer purchased a generator that was also to be installed and tested by the seller, and damage occurred to the generator at the buyer's premises before the generator was installed and tested, that there had been no “delivery.” *See William F. Wilke, Inc. v. Cummins Diesel Engines*, Inc., 252 Md. 611, 250 A.2d 886, 887–90 (App.Ct.1969) (cited in 45 Fla. Jur.2d at 410 (Fla.Co-op.1984)). Installation and testing were material terms of the contract between the parties, and absent the happening of these events, the Maryland Court determined that no “delivery” occurred. *See id.*

Therefore, in the case at bar, given the fact that both witnesses testified that the Debtor here had purchased an “installed” pool heater, and that the pool heater had not been installed as agreed and contracted for, this Court finds that there simply was no delivery by the seller. Further, because there was a nonconforming delivery, the risk of loss always remained with the seller, and never shifted to the Debtor. *See* 45 Fla. Jur.2d at 410 (Fla. Co-op.1984) (*citing to Wilke, supra*).

Under Florida Statute § 672.510(1) the seller (here Sunkissed) cannot shift the risk of loss to the buyer (the Debtor herein) unless the seller's actions conform with all the conditions resting on him under the contract. Since the Debtor contracted for an installed pool heater and the parties concede the unit was never installed, the seller did not conform with all the conditions of the contract, and the risk of loss remained with Sunkissed.

Accordingly, the Court finds that the risk of loss never passed to the Debtor, that the risk of loss remained with Sunkissed, that the Debtor's objection to Sunkissed's claim is sustained, and that Sunkissed's claim is hereby stricken.

Problem 19-2

Tentmaker was tasked by Camper to make a one-of-a-kind tent with specified dimensions and with a weight of no more than 10 pounds so that it could be easily carried around on hiking trips. Tentmaker thought that she could find materials light enough to do the job, but she was wrong – the tent weighed in at 10 pounds, 5 ounces. This was pretty close, and so Tentmaker had the tent delivered by special courier. Since Camper was not at home, the courier left the tent on the front porch, and it was promptly stolen. Tentmaker demands that Camper pay because the tent was very, very close to what was agreed, and it was turned over to Camper when it was left on the porch by courier. Will she be able to recover?

C. Default Shipping/Carrier Terms

The *Ladex* and *Pestana* excerpts introduced several new terms and acronyms that control how commonly used terms are to be defined – a common understanding. Technically, this is not so much an implied terms matter as a mechanism for interpretation, but their relationship to the last subsection is a close one and is also something that has been tested on multistate bar exams. These terms would be included in a contract and unless otherwise specified, will be given the meaning set out in the Code and its state adoptions. Nevertheless, a passing familiarity with the main terms such as *ex ship*, *F.O.B. (free on board*) and *C.1.F. (cost, insurance, freight*) is in order. These are found at U.C.C. Article 2, §2-319 *et seq*.[47] The terms derive from the development of common shipping terms, commonly known as "INCOTERMS," developed by the International Chamber of Commerce to facilitate trans-border transactions involving shipping/carriage. (At the risk of some derision, we point to a Wikipedia site for non-precedential information: https://en.wikipedia.org/wiki/Incoterms#EXW_%E2%80%93_Ex_Works_(named_place_of_delivery) and the ICC web link for INCOTERMS: https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/). There are some small differences between the "U.S." versions and the international ones. Since this is not a transactional, maritime, or shipping law course, we only present on two or three special terms.

§ 2-319. F.O.B. and F.A.S. Terms.[48]

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or
> (b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);
> (c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

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(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and
(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

The only case decided by a Florida appellate court on this set of terms appears to be *Ladex*, excerpted above.

§ 2-322. Delivery "Ex-Ship".[49]

(1) Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2)Under such a term unless otherwise agreed

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and
(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

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It would appear that no Florida appellate courts have addressed this statute. It is likely that cases involving these terms and issues are primarily brought in federal admiralty courts. However, Florida courts retain concurrent jurisdiction over claims in contract and in tort, for example. The *Still v. Dixon* case is offered to clarify that there are other bodies of law where contracts cases may be decided. This could help when researching specialized contracts cases in the future.

STILL v. DIXON

District Court of Appeal of Florida, Second District, 1976

337 So. 2d 1033

SCHEB, Judge.

The issue on this appeal is whether the circuit court acquired jurisdiction of plaintiff's action for money damages in excess of $2500 for alleged breach of contract and negligence incident to a boat towage contract. The trial court held jurisdiction to be exclusively with the federal court and dismissed plaintiff's complaint. Appellant/plaintiff appeals. We reverse.

Plaintiff alleged he contracted to have his boat towed by the defendant to a prepared mooring, but that defendant abandoned the boat in Gasparilla Bay with him aboard; that as a result his boat overturned and he was forced to cling to its keel until rescued. Plaintiff charged the defendant with negligence and breach of contract; sought damages in excess of $2500; and demanded a trial by jury.

The trial court granted the defendant's motion to dismiss with prejudice, stating in an amended order of dismissal:

> 'That this action is dismissed in that this Court is without jurisdiction in actions sounding in tort, and/or negligence, and/or Breach of Contract, and/or personal injury when such actions are connected with or incidental to a maritime towage contract and that jurisdiction of such actions are exclusively within the Federal Courts.'

Article 3, Section 2, of the Constitution of the United States, provides that, 'the judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . ..'

Title 28, United States Code, Section 1333, provides:

> 'The district courts shall have original jurisdiction, exclusive of courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.'

The 'saving to suitors in all cases' clause in Section 1333, *supra*, preserves to a plaintiff the right to institute common law actions in courts of this state seeking in personam judgments for damages arising from maritime torts and contracts. *See Rountree v. A. P. Moller Steamship Co.*, 218 So.2d 771 (Fla.1st DCA 1969), in which Chief Judge Wigginton quoted with approval Norris, Maritime Personal Injuries 209, 2d Ed., Section 84, wherein the author stated:

'The common law courts had concurrent jurisdiction with courts of admiralty prior to the adoption of the Constitution In causes of action against a shipowner in contract on in tort when he could be reached personally and money damages only were demanded. The constitutional provision gave to the admiralty courts exclusive jurisdiction wherever admiralty had such exclusive jurisdiction prior to the adoption of the Constitution; and when the jurisdiction was concurrent with the common law courts it remained so.

'The common law remedy saved to suitors is the right to proceed in personam against the defendant wherever the common law is competent to give a remedy. Stated another way, one who holds an in personam claim enforceable by a libel in personam in admiralty, can bring suit at his election in a common law court provided that the jurisdictional requirements of the latter court is met and the remedy sought is one which the common law court had concurrent jurisdiction with admiralty at the time of the adoption of the Constitution.' (Emphasis supplied)

To be distinguished are actions in rem, i.e., against a vessel, where exclusive jurisdiction is in the federal courts. The exclusion of state courts in the in rem area is based on such proceeding not being a common law remedy. The Hine v. Trevor, 71 U.S. 555, 571, 18 L.Ed. 451 (1867).

Recognizing that distinctions are not always easy, G. Gilmore and C. Black in Law of Admiralty (1957), state the rule as:

'Where the suit is In personam, it may be brought either in admiralty or, under the saving clause, in an appropriate non-maritime court, by ordinary civil action. Where the suit is In rem, only the admiralty court has jurisdiction.' *Id.* at 361. [Footnote omitted]

But, defendant argues, the federal court has exclusive jurisdiction since the plaintiff chose to allege, '1. That this is a suit in admiralty . . .,' and irrevocably elected to submit to federal jurisdiction. Defendant attempts to support this proposition by *Frankfort Elevator Coal Co. v. Prewett*, 212 Ky. 457, 279 S.W. 616 (1926), wherein the court stated:

> 'If appellee had pursued his remedy in admiralty, the federal District Court would have exclusive jurisdiction.'

Defendant's reliance is misplaced, however, since even in Frankfort the state court retained jurisdiction and adjudicated the plaintiff's cause, concluding that since the plaintiff pursued a common law remedy saved to suitors by the Section 1333, Supra, the state court was properly vested with jurisdiction. Although plaintiff alleged his action to be a 'suit in admiralty,' this surplus allegation is not an inconsistency as plaintiff was suing on a maritime tort as well as a contract. And, it is maritime law, not state law, that is the substantive law applied in maritime torts accruing on navigable waters in this country, irrespective of whether the action is brought in a state or federal court. *See Rountree, supra*; *Cashell v. Hart*, 143 So.2d 559 (Fla.2d DCA 1962). Moreover, plaintiff was seeking a trial by jury, not ordinarily provided in admiralty actions in the federal district courts. *Gilmore and Black, Supra*, at p. 31; *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

Reversed and remanded with directions to reinstate plaintiff's complaint.

GRIMES, Acting C.J., and FOGLE, HARRY W., Associate Judge, concur.

Problem 19-3

Buyer wants to order furniture in bulk weighing several tons. The furniture was made in a foreign country and needs to be shipped. Buyer has a great relationship with a carrier at the point of shipment, and knows that the dock hands loading and unloading vessels of cargo are the best in the business. What kind of shipping term should Buyer use? What if the carrier is trustworthy, but the dock hands are well known to treat loads roughly and even to steal some of the cargo from the dock when no one is watching?

D. Open Price Term

This is the first U.C.C.-based *gap filler*, addressed briefly in Chapter 4. The next subsection will consider one of the more commonly used *gap fillers*, the open price term. We add a common law case that cites to Florida's adoption of the open price term provision to demonstrate reasoning by analogy and to

indicate how often there is commonality of rules between sale-of-goods and common law cases.

§ 2-305. Open Price Term.[50]

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
> (b) the price is left to be agreed by the parties and they fail to agree; or
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
>
> (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
>
> (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
>
> (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

Again, you may want to write short terms in the margins next to each subsection to help with comprehension and with memory. For example: (1) parties can leave open price term; (2) if one party chooses, must be in good faith; (3) failure by one party to fix empowers the other party; and (4) where there is no intent to agree in future on price such that the deal unravels.

The following case excerpt considers whether an open price term, along with another unsettled term or two, causes the contract to fail for lack of formation for still being within the period of preliminary negotiations. These ideas are introduced in Chapter 4. The *Borenstein* case also introduces the distinction between realty and personalty, only the latter of which would be governed by U.C.C.-styled rules. The case excerpt that follows indicates that the same rule may be applied to common law cases. It would appear that the court in *Giacolone* relied on the U.C.C.-styled open price term provision by analogy.

[50]

Keep in mind that the *Giacolone* case is a bit of an outlier for the fact that it is a common-law, and not a sale-of-goods, case.

BORENSTEIN v. SOMERSON

District Court of Appeal of Florida, Second District, 1977

341 So. 2d 1043

HOBSON, Acting Chief Judge.

In this mortgage foreclosure proceeding plaintiff/appellant, mortgagee, appeals the final judgment holding, *inter alia*, that the crop of citrus fruit was constructively severed from the mortgaged realty and that the proceeds from the sale of said fruit accrued to the benefit of the defendants, mortgagor and its caretaker, less expenses deducted for maintenance of the property during receivership. In the court below two cases [footnote omitted] were consolidated and this appeal is taken from the final judgment entered in the consolidated cases following trial. We affirm.

In March of 1973 mortgagors, Somerson, Keiden, and Weissman (hereinafter Somerson), purchased a 330-acre citrus grove from mortgagee, Bornstein, evidencing a portion of the purchase price by a purchase money mortgage and note in the amount of $3,187,500. At the time of sale all that year's crop had been harvested by the mortgagee with the exception of some late bloom fruit which was excluded from that sale by specific reservation in the deed and in the mortgage. The mortgagee did not specifically reserve any lien or security interest on any future crops subsequent to July 1, 1973. The mortgage also provided that '. . . the property herein described is and shall be the sole security for any and all sums due the mortgagee . . . and in the event of default, the mortgagee shall not be entitled to a deficiency judgment against the mortgagor . . .' The mortgage contained a standard caretaking clause obligating the mortgagors thereunder and an habendum clause which provided,

> 'To have and to hold the same, together with the tenements, hereditaments and appurtenances thereto belonging, and the rents, issues and profits thereof, unto the mortgagee, in fee simple.'

Somerson thereafter employed appellee, Parker Brothers, to caretake the grove and sell, as an agent, the fruit for the 1973—74 season. The fruit was sold by Parker Brothers for Somerson for that year. Thereafter on June 18, 1974 Parker Brothers, on behalf of Somerson, negotiated and entered into an agreement with appellee B. C. Cook and Sons, Inc., a fruit buyer, to sell the

1974—75 fruit crop. The effect of this agreement is sharply disputed by the parties and forms the basis of the judgment below.

This document, designated 'Purchase Agreement and Contract' provided that the seller (Somerson-Parker Brothers) 'does hereby bargain, sell and transfer unto the buyer (B. C. Cook) all the fruit that meets the standards for the use agreed upon or specified in this contract at the time of picking the fruit . . .' The contract further provided that, 'Price of fruit, harvesting and delivery charges and harvesting dates shall be mutually agreed upon between the BUYER and SELLER before the fruit is harvested.' The document also contained a provision for a ten cents handling charge per box in the event the seller sold to another buyer. [Footnote omitted] In the same manner failure on the part of the buyer would result in retention by the seller of any advance made by the buyer as well as the voiding of the contract. No advance was made by Cook toward the sale of the crop at execution of this document. [Footnote omitted]

A supplemental contract was executed between the parties for tangerines (a variety mentioned in the June 18 agreement) on September 16, 1974 and a $5,000 deposit was paid by Cook to Parker Brothers at that time. [Footnote omitted]

On October 10, 1974 mortgagee Bornstein initiated the mortgage foreclosure action and a receiver was appointed by the court. The complaint sought foreclosure on the real property described in the mortgage including the citrus grove and all citrus fruit then growing. None of the 1974—75 crop had been harvested as of this date. The receiver, acting upon court authority, took control of the citrus grove and employed Polo Grove Service, Inc. to perform caretaking during the term of the receivership. The 1974—75 fruit crop was subsequently sold by the receiver for the aggregate sum of $113,868.34, with all the fruit, except the navels, going to Cook pursuant to court direction. [Footnote omitted] The proceeds of this sale were vested in the receiver.

On May 12, 1975 the lower court entered its final judgment specifically finding that the agreement executed on June 18 constituted a contract for the sale of the 1974—75 fruit crop which constructively severed the fruit from the realty so as to remove the proceeds from the sale of the same from the lien of the mortgage. The court directed that the proceeds from the sale and expenses of receivership would be apportioned as follows:

(A) Caretaking expenses ($28,798.45) incurred by the receiver. That portion attributable to the harvested fruit crop and thereby benefitting the mortgagor $11,797.29. The remainder paid to Polo are attributable to the grove (mortgagee) and are to be paid by the same.

(B) Employment of fruit price estimator ($100) charged to the mortgagor.

(C) Receiver's fee ($1,750) primarily of benefit to mortgagee to be paid by Bornstein.

(D) 1974 real estate taxes, paid by the receiver ($8,864.98), charged to mortgagee.

(E) All remaining proceeds of the sale to be paid to mortgagors and Parker Brothers. [Footnote omitted]

The final judgment further provided for the sale of the property encumbered by the mortgage being foreclosed. The sale was held on May 29, 1975, and the mortgagee Bornstein bid in the property for the sum of $330,000.

This appeal presents for determination several issues of vital significance to the citrus industry in Florida. These questions may be summarized as follows:

(1) Whether an agreement which facially purports to be a contract, but lacks any price, harvesting date and harvesting and delivery charge, and was executed without any deposit being paid, can operate to constructively sever a citrus crop from the mortgage on the underlying ditrus grove to the benefit of a mortgagor in a mortgage foreclosure action; and

(2) Whether a mortgage on realty, with a standard reservation of lien on ‘rents, issues and profits,‘ can defeat the operation of the doctrine of constructive severance so as to vest the proceeds of the sale of a fruit crop, sold during foreclosure proceedings, in the mortgagee as a ‘profit’ of the realty.

For the reasons stated herein, we answer the first question in the affirmative and the second in the negative.

It is axiomatic that in Florida crops of fruit are in general parts of the realty until severed. *Simmons v. Williford*, 60 Fla. 359, 53 So. 452 (1910); *Adams v. Adams*, 158 Fla. 173, 28 So.2d 254 (1946); *Peer v. Willson*, 210 So.2d 495 (Fla.App.2d DCA 1968); 9A Fla.Jur., Crops § 3. However, by acts or intention of the owner, growing fruit may be constructively severed and thus converted into personalty for the purposes of mortgage or sale, even though the fruit remains on the trees. *Simmons, supra*; *Owen v. Commissioner*, 192 F.2d 1006 (5th Cir. 1951*). Cf. Exchange National Bank of Tampa v. Alturas Packing Co.*, 269 So.2d 733 (Fla.App.2d DCA 1972). Thus a sale or mortgage of the fruit, even though under a general mortgage of the realty, effectively removes the fruit from the realty and out of reach of the mortgagee unless the latter provides otherwise. [Footnote omitted] The parties agree that the sale of the tangerines, pursuant to the supplemental contract, fell within this latter category as a constructive severance. Additionally, no dispute exists as to

whether Bornstein explicitly reserved any rights to future fruit crops on the mortgaged land. He did not.

Although Bornstein asserts that the agreement executed on June 18, 1974 was nothing more than an agreement to agree, [footnote omitted] we think the import and significance of this document requires that it be construed as a binding contract. It is clear that the fruit, at the time of the sale, were goods as contemplated by § 672.2—107(2), Florida Statutes (1975). It is equally recognized that a contract for the sale of goods will not fail for indefiniteness even though one or more terms are left open. Section 672.2—204(3), Florida Statutes (1975). However, the latter rule is tempered by the proviso that: 1) the parties must have intended to make a contract and 2) there exists a reasonably certain basis for giving an appropriate remedy. Section 672.2—204(3), Supra. As stated in Uniform Commercial Code § 2—204, Comment 3,

'The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather commercial standards on the point of 'indefiniteness' are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like.'

Florida courts, both prior to and after the adoption of the Uniform Commercial Code, have recognized these principles with respect to 'open terms.' *See, e.g. Roe v. Winter Haven Co.*, 104 Fla. 317, 140 So. 463 (1932); *Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Financial Corp.*, 302 So.2d 404 (Fla.1974). In *Roe, supra*, involving an agreement for the sale of fruit, it was held that mere inability to ascertain the quantity and price of the fruit at the time of contracting did not prevent the contract from operating as contract In praesenti. The contract was held as passing title at the time of its execution. Similarly, our Supreme Court, in addressing the point of indefiniteness in *Blackhawk Heating & Plumbing, supra*, stated,

'The contract should not be held void for uncertainty unless there is no other way out. As was stated by Justice Cardozo in Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., 232 N.Y. 112, 133 N.E. 370, 371, 'Indefiniteness must reach the point where construction becomes futile.''

This view conforms with the official comments to Section 672.2—204(3). [Footnote omitted]

Even without the benefit of Section 672—2.204, *Supra*, other sections of the Florida Uniform Commercial Code would remedy the alleged deficiencies in this contract. See, Section 672.2—305, Florida Statutes (1975) (open price term) and Section 672.2—309, Florida Statutes (1975) (absence of specific time provisions). These sections contained in Article 3 of our Commercial

Code read in Pari materia with the liberal interpretation given Section 672.2—204, Supra, enable us to answer sufficiently any contention that the contract Sub judice fails to specify price, harvesting dates and harvesting and delivery costs. In fact, as a complement to 672.2—204, Supra, the official comment to 672.2—305, Supra, provides in part,

‘This section (672.2—305) applies when the price term is left open on the making of an agreement Which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that ‘an agreement to agree is unenforceable’ . . . and rejects also defeating such agreements on the ground of ‘indefiniteness'. Instead this Article recognizes the dominant intention of the parties to have the deal continue to be binding on both.’ (emphasis added) Uniform Commercial Code § 2—305, Comment 1.

In construction of a written contract it is the duty of the court to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, to determine the meaning and intent of the language employed. *St. Lucie County Bank & Trust Co. v. Aylin*, 94 Fla. 528, 114 So. 438 (1927); *Blackhawk Heating & Plumbing Co., Inc., supra*. On appeal, unless clearly erroneous, the construction placed upon a contract by the trial judge should be affirmed. *Clark v. Clark*, 79 So.2d 426 (Fla.1955); *Rylander v. Sears, Roebuck & Company*, 302 So.2d 478 (Fla.App.3d DCA 1974). After close examination of the subject agreement, we conclude that that the trial judge's construction of this citrus ‘Purchase Agreement and Contract’ was correct. While parts of the contract were more nearly akin to a ‘handling’ type of agreement whereby Cook would act as the owner's agent for the sale of fruit, the court was privileged to accept the expert testimony which characterized this type of contract in the citrus industry as a sales contract. It is obvious from the record that both Parker Brothers and B. C. Cook & Sons intended to be bound and that the price of the fruit, the picking and hauling charges, and the picking dates were to be set according to prevailing industry standards on those dates.

We are cognizant of the mortgagee Bornstein's admonition that to uphold this citrus sales agreement as a contract, which constructively severs the fruit crop from the mortgaged realty, will jeopardize the position of all mortgages on land with citrus crops growing thereon. However, we would note that substantial evidence was adduced during these proceedings to suggest that this type of sales agreement, with one or more terms left open, is common in the citrus industry and that greater harm would be done by holding this contract void for indefiniteness. This conclusion is required in this instance [footnote omitted] in light of the modern rules of construction, statutory directives, and case law applying these principles. *Cf. Exchange National Bank of Tampa, supra*. Moreover, despite the mortgagee's assertions, an

adequate remedy was available to Somerson and Parker Brothers upon default by Cook. [Footnote omitted]

Mortgagee Bornstein's next contention is that despite the constructive severance, the proceeds of the sale of the citrus crop by the receiver were ‘rents, issues and profits' which should have been applied to satisfy the mortgage indebtedness rather than paid to the mortgagor and their caretakers, Parker Brothers. Although Bornstein correctly asserts that the significance and effect of the encumbrance or pledge of the issues and profits is not linked to the operation of the doctrine of constructive severance, he misinterprets the effect of the latter doctrine as it applies in the case Sub judice. The general rule with respect to a mortgage pledging rents, issues and profits is that the mortgagee becomes entitled to receive such rents, issues and profits to be credited against his mortgage debt from the time he takes possession of the property either by consent of the owner or through the appointment of a receiver in foreclosure proceedings. *See White v. Anthony Inv. Co.*, 119 Fla. 108, 160 So. 881 (1935) and authorities cited therein. In *White* the Supreme Court also posited,

‘. . . The rule appears to be that he is not only entitled to the rents which accrue after that time, but he is entitled to such rents as have accrued prior to the appointment of a receiver And after default but which have not been paid.’ (emphasis supplied) 160 So. at 882.

The Key consideration here is that at the time of default, some three and one-half months after execution of the fruit contract, the fruit crop, having been constructively severed, was no longer part of the mortgaged res. Therefore, the proceeds of that crop, having been sold during the term of the receivership, were personalty of the mortgagor and not a rent, issue, or profit of the mortgaged realty subject to application for reduction of the mortgage indebtedness. *Cf. Bay Realty Corporation v. Becker*, 157 So.2d 91 (Fla.App.3d DCA 1963). *See also*, 22 Fla.Jur. Mortgages § 451. Were there no constructive severance of the fruit crop by the contract of June 18, 1974, then the mortgagee would be correct in asserting that these proceeds should have been applied to reduce the mortgage indebtedness. However, the default and appointment of a receiver occurred after the severance of the crop from the mortgaged realty and the proceeds herein were properly returned to the mortgagor less monies owed to the caretaker and expenses of the receivership.

Other propositions argued have been carefully considered, but no special comment is found to be necessary with reference to same. Accordingly, the judgment is

AFFIRMED.

GRIMES and SCHEB, JJ., concur.

* * *

GIACOLONE v. HELEN ELLIS MEMORIAL HOSP. FOUNDATION, INC.

District Court of Appeal of Florida, Second District, 2009

8 So. 3d 1232

WALLACE, Judge.

Andrew Giacalone petitions this court for a writ of certiorari to quash the circuit court's order denying his motion to compel responses to discovery requests propounded to Helen Ellis Memorial Hospital Foundation, Inc. [Footnote omitted] We hold that the circuit court's order departed from the essential requirements of the law, causing material injury to Mr. Giacalone for which there is no adequate remedy at law. Accordingly, we grant the petition and quash the circuit court's order.

FACTS AND PROCEDURAL HISTORY

On October 13, 2006, Mr. Giacalone was admitted to the Hospital on an emergency basis and underwent surgery during which a pacemaker was implanted. On his admission to the Hospital, Mr. Giacalone signed a standard form in which he agreed-in pertinent part-"to pay the account at the hospital in accordance with the regular rates and terms of the hospital." Mr. Giacalone was uninsured and requested that he be treated under the Hospital's charity program, claiming that he had no income or available credit. He was released on October 16, 2006. The next day, Mr. Giacalone paid the Hospital $1000 on his account. Subsequently, the Hospital determined that Mr. Giacalone was not eligible for the charity program.

On December 13, 2006, the Hospital's attorneys sent Mr. Giacalone a letter notifying him that he owed the Hospital $52,280.70. Mr. Giacalone responded promptly in writing and disputed the charges.

In February 2007, the Hospital filed an action against Mr. Giacalone seeking to recover the unpaid charges. Mr. Giacalone answered, asserting the affirmative defenses of unconscionability (unreasonable pricing), lack of mutual assent and fraudulent nondisclosure, and undue influence. He also counterclaimed, alleging claims for unfair or deceptive trade practices, breach of contract (implied covenants of good faith and fair dealing), and for declaratory relief. The central theme of Mr. Giacalone's defenses and counterclaims was that the Hospital's charges for its services were unreasonable and unconscionable.

Subsequently, Mr. Giacalone served on the Hospital a request for production of documents and a set of interrogatories. The Hospital objected to the production of most of the documents and declined to respond to several of the interrogatories. Mr. Giacalone filed a motion to compel discovery. After a hearing, the circuit court issued a form order denying the motion.

* * *

DISCUSSION

The primary claim on which Mr. Giacalone bases his defenses and counterclaims is that the charges for the supplies and services rendered to him by the Hospital were unreasonable. The information Mr. Giacalone sought by his motion to compel was broadly pertinent to the Hospital's charges and the discounts granted to the various categories of patients that it serves (e.g., self-pay patients, Medicare patients, Medicaid patients, charity care patients, and privately insured patients) and to the Hospital's internal cost structure. Mr. Giacalone argues that this information was not only relevant but critical to establish his defenses and counterclaims. We agree.

In *Payne v. Humana Hospital Orange Park*, 661 So.2d 1239 (Fla. 1st DCA 1995), the First District noted:

> A patient may not be bound by unreasonable charges in an agreement to pay charges in accordance with "standard and current rates." *Mercy Hosp. v. Carr*, 297 So.2d 598, 599 (Fla. 3d DCA 1974). When a contract fails to fix a price furthermore, a reasonable price is implied. *See F.L. Stitt & Co. v. Powell*, 94 Fla. 550, 556, 114 So. 375, 378 (1927) (holding that, where a contract for legal services fails to expressly provide for the amount of the fee, a "reasonable" fee is implied); *McGill v. Cockrell*, 88 Fla. 54, 58, 101 So. 199, 201 (1924) (where a contract fixes no definite sum to be paid for services, "a reasonable sum is presumed by law to have been contemplated by the parties"); cf. 19A Fla. Stat. Ann. 218 (1993) (§ 672.305(2): "A price to be fixed by the seller or by the buyer means a price for him to fix good faith."), cmt. at 219 ("This seemingly unnecessary admonition was included to deny to the seller the unbridled license to fix any exorbitant or unreasonable price he may wish.").

Id. at 1241 (footnote omitted). Thus the reasonableness of the Hospital's charges was the primary issue to be determined in the pending action. We also note that the Hospital first placed the reasonableness of its charges at issue by alleging in its complaint that "[t]he reasonable value of [its] unpaid services totals $52,280.70."

In *Colomar v. Mercy Hospital, Inc.*, 461 F.Supp.2d 1265 (S.D.Fla.2006), the United States District Court for the Southern District of Florida outlined three nonexclusive kinds of evidence relevant to the determination of a claim of unreasonable pricing by a hospital:

> A thorough review of the case law from Florida and elsewhere leads to the conclusion that no single factor can be used to determine the reasonableness of Mercy's hospital charges. Rather, several non-exclusive factors are relevant to the inquiry. As discussed in more detail below, those factors include but are not necessarily limited to: (1) an analysis of the relevant market for hospital services (including the rates charged by other similarly situated hospitals for similar services); (2) the usual and customary rate Mercy charges and receives for its hospital services; and (3) Mercy's internal cost structure. Consideration of the [second amended complaint] in light of these factors establishes that Plaintiff has stated a claim for breach of contract and violation of [Florida's Deceptive and Unfair Trade Practice Act] based on unreasonable pricing.

Id. at 1269. Here, the order denying the motion to compel discovery prevents Mr. Giacalone from developing two of the three kinds of relevant evidence outlined by the Colomar court: (1) the discovery of the Hospital's charges and the discounts that it grants to the various categories of patients it serves and (2) the Hospital's internal cost structure. By preventing Mr. Giacalone from making any inquiry into this relevant information, the circuit court's order denying the motion to compel departs from the essential requirements of the law.

The Hospital argues that Mr. Giacalone has not shown irreparable injury because he has not exhausted other means of obtaining pertinent information, such as comparative market pricing. We disagree. The use of comparative market pricing is only one type of relevant information which may be helpful in establishing a claim of unreasonable pricing. As the Colomar court points out, the proof of such a claim may also involve inquiry concerning the usual and customary rates the Hospital charges and receives for its services and concerning the Hospital's internal cost structure, in addition to a comparative analysis of the relevant market. *Colomar*, 461 F.Supp.2d at 1269.

Furthermore, we note that the circuit court's order is a form order containing no explanation of its decision to deny the motion or an analysis of the individual requests. Under the circumstances shown here, such a blanket denial of relevant discovery is insufficient. See Towers v. City of Longwood, 960 So.2d 845, 849 (Fla. 5th DCA 2007) (holding that the trial court's order labeling the entire document production process a fishing expedition was

“insufficient, particularly where it is obvious from looking at the notice to produce and the allegations in the complaint that the document production is being directed at many relevant items”).

Finally, we have not overlooked the Hospital's argument that the circuit court properly denied the motion to compel because the information requested by Mr. Giacalone constitutes trade secrets. However, we need not address this issue. Although the Hospital asserted its trade secrets claim in opposition to the motion to compel, the circuit court made no finding either at the hearing on the motion to compel or in its written order that any of the requested information constitutes trade secrets. When the circuit court reconsiders the motion to compel on remand, it should give appropriate consideration to the trade secrets issue under section 90.506, Florida Statutes (2008). *See Ameritrust Ins. Corp. v. O'Donnell Landscapes, Inc.*, 899 So.2d 1205, 1207 (Fla. 2d DCA 2005).

CONCLUSION

We conclude that much of the information Mr. Giacalone seeks is either directly relevant to his defenses and counterclaims or is reasonably calculated to lead to the discovery of admissible evidence. Because the documents sought and the questions raised in the interrogatories are critical to Mr. Giacalone's defenses and counterclaims, the circuit court departed from the essential requirements of the law in making a blanket denial of Mr. Giacalone's discovery requests. On remand, the circuit court should reconsider the individual requests and address the Hospital's trade secrets claim.

The circuit court's order will cause irreparable injury that cannot be remedied on appeal. Accordingly, we grant the petition, quash the circuit court's order, and remand for further proceedings consistent with this opinion.

Petition granted; order quashed.

KELLY and VILLANTI, JJ., Concur.

Problem 19-4

Retailer contacted Manufacturer to open discussions about buying Manufacturer’s products made overseas and shipped to Retailer’s locations. The parties agreed on the price term (a set price per unit, to be reduced per unit after certain target order volumes were reached). Is the lack of a time and place for delivery fatal to formation? What if the shipping terms were missing such that it was unclear who bore the risk of loss during transit prior to ultimate delivery? What if the terms were unclear on whether the shipment

was to be one-off, or in a series of deliveries? What result if all of these terms were unclear or missing?

Note

The Uniform Commercial Code and state adoptions of it provide for the possibility of *installment contracts*, i.e., those that envision multiple deliveries as part of the same contract. U.C.C. § 2-612(1); FLA. STAT. § 672-612(1) (2017). Monthly deliveries of coffee beans to a roasting facility is a good example. The buyer would inspect each lot for quality. The question arises, what can a dissatisfied buyer do when one of the installments is completely unacceptable, and the seller is unable or unwilling to cure the shipment in time for the buyer to supply his customers? May the buyer cancel the entire contract, even if there are several years to go until its termination or renewal date?

The answer depends on the nature of the breach. If the breach is only to a particular installment, a buyer could reject the *installment* where, in U.C.C. terms, the non-conformity substantially impairs the value of that installment (and cannot be cured). U.C.C. § 2-612(2); FLA. STAT. § 672-612(2) (2017). However, if the non-conforming installment substantially impairs the value of the *entire contract*, the buyer may treat it as a breach of the entire contract and terminate even with respect to future deliveries. U.C.C. § 2-612(3); FLA. STAT. § 672-612(3) (2017). To cancel the entire contract, however, the buyer must either reject the non-conforming installment, seasonably notify the seller of cancellation if the installment is kept, bring an action for breach of the entire contract (and not just past installments). *Id*. The buyer must also refrain from demanding performance of future installments (which, if the buyer did, would indicate that the breach was not a substantial impairment of the value of the entire agreement).

You may have noted that a buyer must *seasonably* notify the seller of cancellation in the case that the buyer wishes to terminate a contract but keep a non-conforming shipment. Other articles make reference to "reasonable time" as the time referent. An example is the gap-filler found in U.C.C. § 2-309(1); FLA. STAT. § 672.309(1) (2017) – contracts that lack a specific time for shipment or delivery if not otherwise agreed must occur within a *reasonable time*. Apparently, the term *seasonable* encompasses two things: (1) the sense of proper timing when the time for performance is specified, and (2) a sense of proper timing when the time for performance is not specified.

§ 1-205. Reasonable time; Seasonableness.[51]

51

(a) Whether a time for taking an action required by the Uniform Commercial Code is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

As another example of something that must be done within a *reasonable time* pursuant to Uniform Commercial Code standards is the time by which a party who has accepted non-conforming goods may still be able to revoke acceptance (which, after this point, leaves only warranty damages). The following excerpt raises the right to revoke acceptance (which, at this point, is probably beyond a first-year contracts course – suffice it to say that when a dissatisfied buyer of goods cannot reject (perfect tender rule) for some reason, e.g., the buyer has held the goods too long but learns of a latent defect, with a bit more trouble that buyer may be able to revoke acceptance).

CENTRAL FLORIDA ANTENNA SERVICE, INC. v. CRABTREE

District Court of Appeal of Florida, Fifth District, 1987

503 So. 2d 1351

* * *

[S]ection 672.608, Florida Statutes (1985) entitled "Revocation of Acceptance," is controlling. [Footnote omitted] Article Two of the Code impacts on this case, whether or not the lower court or the parties were aware of it because the transaction falls within its scope and definition. [Footnote omitted]

Rescission in the context of this case is reworded by the UCC in section 672.608, Florida Statutes (1985) as follows:

672.608 Revocation of acceptance in whole or in part.—

(1) The buyer may revoke his acceptace of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:
(a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
(b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) *Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.*

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them. (Emphasis added).

In this case, based on the stipulated record, Crabtree accepted the system by keeping it for in excess of a year, and paying for it in full after it was made to function to his satisfaction. [Footnote omitted] Thereafter, section 672.608 limited and controlled his ability to revoke his acceptance. By waiting until May of 1985 to seek rescission, having had possession and use of the system for one and a half years, Crabtree clearly did not act "within a reasonable time" [footnote omitted] after discovering the systems's defects. In most cases the reasonableness of the delay is a fact question. [Footnote omitted] However here, Crabtree's one and a half year delay after knowledge of the system's problems forecloses his remedy of revocation as a matter of law. [Footnote omitted]

* * *

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 19

(45) The difference between supplementation by a different body of law and the use of a different body of law by analogy

(46) In sale-of-goods contracts, the specialized risk of loss rules, including understanding of shipment and destination contracts, and a sense of the specialized shipping terms that help to allocate risk between the parties

(47) The unique rules on installment contracts

(48) Real estate, crops, sale of goods, severance, and constructive severance

SUGGESTED EXERCISES

39. Look up the INCOTERMS on the International Chamber of Commerce's website (or some other source) and compare them to those found in the U.C.C. and state adoptions of U.C.C. Article 2.

40. Do some preliminary research on the nature of the Convention on the International Sale of Goods ("CISG"), and try to compare it to its U.S. relative, Article 2 of the Uniform Commercial Code. Which is more comprehensive? Why?

41. Map out when sellers and when buyers bear the risk of loss during shipping, using categories such as “destination,” “shipping,” “no breach,” “with breach,” and “by special agreement.”

CHAPTER XX: OTHER WAYS TO AVOID FORFEITURE

It is clear from the materials in Chapter 19 that the law does not favor forfeitures. This is not to say that courts will not sanction forfeitures for actionable failures of condition (or breach of contract, for that matter). However, the desire of courts to reach results that seem fair, by avoiding the application of law that can lead to harsh results, is obvious. One need only recall the equitable remedies in Chapter 12, which rely on court's *equity jurisdiction* (what is fair) rather than its *legal jurisdiction* (what the law requires). Knowing that the use of equity is potentially applicable in every case anyway, courts have been able to creatively exercise fairness by the use of a variety of mechanisms, even when operating within the realm of law rather than equity. A very good example is found in Chapter 19: if an ambiguity in a condition can be established, that "condition" can be interpreted as a promise, which may be satisfied by *substantial performance*. (Perhaps some damages would reduce a recovery, of course). This avoids an outright forfeiture that the failure of a condition would support.

There are other mechanisms to reach the same result, i.e. avoidance of forfeiture when it is just too harsh. A problem is where to locate these mechanisms within the body of contract law. We collect some of them here to represent some alternatives to the "ambiguity = promise," i.e., application of *substantial performance* method addressed in the Chapter 18. This may cause just a little confusion because these mechanisms will remind of other legal concepts and therefor lead to the question why they are not located in other Chapters. The simple answer is that it is not possible to cover every example of a legal concept before moving on to new topics. For example, the *duty to cooperate* and the *duty of good faith* (and fair dealing) are both implied-in-law *gap-fillers* which wend their way into every contract. Further, equitable estoppel based on something like waiver of enforcing a condition could also be covered in Chapter 12 on Equitable Remedies. In the case that a situation involves promises rather than conditions, those promises may be interpreted (Chapter 16: Interpretation) as mutually dependent, thereby suspending the requirement of performance of one until the corresponding promise has been honored. Sometimes when a proper result suggests itself based on the facts, courts may find more than one way to reach the right conclusion:

Restatement (Second) of Contracts § 229:
Excuse of a Condition to Avoid Forfeiture

> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

The implied duties addressed in Sections 2 and 2 below stem from a common source – the courts' ability to imply as a matter of law the duty of parties to a contract to work toward honorable and proper performances under contract to reach a proper, intended result. In fact, the *PL Lake Worth Corp.* opinion uses both terms seemingly interchangeably. Regardless whether they are the same thing, lawyers should be able to articulate both. Section 3 addresses waiver of a right and begins with a reminder of the required elements of a waiver claim, disclaimer of waiver in a contract, some thoughts on policy behind the concept of waiver, and a case reminding that estoppel is the *action* requested of a court, and waiver is the *reason* for such request. Section 4 considers a possible mechanism to avoid forfeiture: use of the doctrine of *election of remedies*. For this to apply, the facts would need to fit a specific procedural pattern, and it would be a stretch. To be thorough, Section 5 addresses the situation where there are promises in different agreements that may be equated in a way to avoid forfeiture.

Myriad issues can arise to detract from the laudable goal of avoiding forfeiture. For example, a company may empower a new business officer who does not like the way that existing longer-term contracts were concluded. That new officer may look for *any* reason to terminate the contract in order to seek other partners and opportunities. That officer's yearly bonus may, for example, depend in part on how much the company saves under that officer's tenure. The ability to terminate "expensive" contracts in favor of cheaper (perhaps shorter-term) contracts could lead directly to a larger yearly bonus. To avoid breach while trying to terminate a contract for breach, it is important to try to find some reason that puts the other side in breach or demonstrates failure of a necessary condition. Often, the original intent of the parties differs markedly from what is presented in court. Where there are technical failures of condition that would otherwise justify termination and therefore forfeiture, a court may be able to imply a corresponding duty on the party seeking termination. If a party arguing its right to terminate has failed in its implied duty, this may be used to counteract the effects of any failure of condition by the other party.

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1. Implied Duty to Cooperate

PL LAKE WORTH CORP. v. 99CENT STUFF–PALM SPRINGS, LLC

District Court of Appeal of Florida, Fourth District, 2007

KLEIN, J.

Appellant, the owner of a shopping center, leased space to the appellee, 99Cent, at a square foot rate which did not include common area expenses or real estate taxes for five years. It also gave 99Cent several options to renew for five years at a specified base rent, plus unspecified common area maintenance and taxes. Months before it came time to exercise the option, 99Cent asked the owner for, but was refused, information as to the estimated charges for maintenance and taxes. 99Cent ultimately exercised the option when it finally received the information, but this was after the time to exercise had expired. In this lawsuit the trial court found in favor of 99Cent, because the owner, in refusing to supply the information, had breached an implied duty of good faith. We affirm.

In 2000, when the five year lease was executed, the property was in distress, and 99Cent was able to negotiate a very favorable rate of six dollars a square foot with no common area maintenance or real estate taxes. The lease provided 99Cent with options to renew for three successive five year periods at a base rent of four dollars a square foot, plus unspecified common area maintenance and taxes. In order to exercise the option 99Cent was required to give written notice to the owner by November 2, 2005.

During the summer of 2005, 99Cent requested, on more than one occasion, information from the owner as to what the estimated maintenance expenses and real estate taxes would be in 2006. Although the owner initially said it would supply the information, it never did, and testified at trial that it refused to provide the estimated 2006 information because the lease did not require it to do so.

99Cent did not exercise the option by the deadline of November 2, 2005, because it had not yet received the information, and the owner filed this action seeking a declaratory judgment that the option had expired and that 99Cent was required to vacate as of April 30, 2006. 99Cent defended on the basis that the owner had breached an implied good faith duty to provide 99Cent with the information it needed in order to determine whether it should exercise the option. It sought declaratory and injunctive relief in order to obtain the information and have the opportunity to exercise the option. Within hours after the owner disclosed the maintenance and tax information pursuant to court order, 99Cent exercised its option to renew on February 3, 2006.

After a nonjury trial, the court found that the owner had breached an implied duty of good faith, when it refused to give 99Cent the information 99Cent needed in order to make an informed decision to exercise its option to renew. The court relied on *Sharp v. Williams,* 141 Fla. 1, 192 So. 476, 480 (1939):

> When a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing; and indeed if the situation is such that the cooperation of one party is an essential prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary cooperation....
>
> Prevention or hindrance by a party to a contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party, or the discharge of a duty by him, is a breach of contract. [Citations omitted.]

The owner's argument is simply that, because the contract did not require the owner to furnish the information, there was no duty to do so. This argument of course ignores that there can be an implied duty to cooperate, which our supreme court recognized in *Sharp,* and which is explained more thoroughly by Judge Van Nortwick in his comprehensive opinion in *Cox v. CSX Intermodal, Inc.,* 732 So.2d 1092 (Fla. 1st DCA 1999).

An analogous situation was presented in *Bowers v. Medina,* 418 So.2d 1068 (Fla. 3d DCA 1982), in which a contract for the sale of a residence required the purchasers to obtain a mortgage loan for a specific amount. The owners, however, refused to make the property available for the appraisal, which was necessary for the purchaser to obtain the loan commitment. The trial court found that the owners had breached a good faith duty of cooperation by refusing to permit the appraisal, and the third district affirmed stating:

> An established contract principle is that a party's good-faith cooperation is an implied condition precedent to performance of the contract; where that cooperation is withheld, the recalcitrant party is estopped from availing himself of his own wrong doing.

Id. at 1069.

The owner's argument that the implied covenant of good faith cannot be used to vary the express terms of a contract, *City of Riviera Beach v. John's Towing,* 691 So.2d 519 (Fla. 4th DCA 1997), is correct but misplaced in this case. If the lease had expressly provided that the owner was not responsible to furnish the information in dispute, the owner would have a point. In this case, however, the lease was silent, and the finding by the trial court that the owner had an implied duty to furnish this information, so that 99Cent could make an informed decision as to whether to exercise the option, is supported by the evidence and the law.

Affirmed.

STEVENSON, C.J., and SHAHOOD, J., concur.

CMM Approach: You may have noted that the court in the last case used language of breach rather than of condition (failure). The authors have recommended careful distinction between breaches of contractual duties on one hand, and failures of condition on the other. Perhaps the confusion may be explained by the parties' arguments and/or the courts' preference for remedy. In cases of serious error or perhaps in the early phases of contractual performance, preventing a duty from arising (condition precedent) or cutting off an existing duty (condition subsequent) is preferred. In other cases, compensation and keeping a contractual relationship together may be preferred – and breach of contract rules better address this goal.

2. Implied Duty of Good Faith

This too should seem familiar – it was addressed in Chapter 18. If nothing else is new, this case demonstrates use of this implied duty in the context of construction contracts and sub-contracting.

AVATAR DEVELOPMENT CORPORATION v. De PANI CONSTRUCTION, INC.

District Court of Appeal of Florida, Fourth District, 2002

834 So. 2d 873

DAVIDSON, LISA, Associate Judge.

Avatar Development Corporation (Avatar) is the developer of Harbor Islands, a residential community in Hollywood, Florida. Avatar entered into a contract with De Pani Construction, Inc. (De Pani), a stucco contracting company, for De Pani to perform stucco work on various parts of the development. On March 22, 1995, the parties executed a Master Construction Contract (Master Contract) which set forth the parties' obligations. The Master Contract contained a termination clause, Article 67, which provided in pertinent part:

> 67.1 The Company [Avatar] may terminate this Agreement at any time for any reason by giving at least ten (10) days prior written notice.
>
> 67.2 Upon any termination of this Agreement, the Contractor [De Pani] shall be entitled to payment for work finished, installed or in process which is acceptable to the Company.

> 67.3 The Contractor, upon termination of the Agreement, shall forthwith peaceably and quietly surrender to the Owner all premises, facilities, machinery and equipment furnished to or belonging to the Owner.
>
> 67.4 Notwithstanding the above, the Owner at its discretion shall have the right to require Contractor to complete any or all work underway which is subject to a notice to proceed.

In an effort to expand De Pani's work on the Harbor Islands project, the parties entered into four subsequent addenda to the Master Contract. Each addendum contained the following clause:

> All of the terms and conditions of the Master Construction Contract Agreement which do not directly conflict with the above shall remain of full force and effect and be incorporated in this Addendum.

In Addenda 3 and 4, the following clause was added:

> All of the above mentioned prices shall stay in full force and effect until December 31, 1997. The Contractor and the Owner will mutually agree upon any changes to the above mentioned prices, if required. This Agreement shall automatically renew for one (1) additional year unless written notice is received by the Owner from the Contractor thirty (30) days prior to its expiration.

On September 17, 1997, Avatar notified De Pani by letter that, pursuant to Article 67 of the Master Contract, it had decided to terminate the Master Contract and all addenda ten days from the date of the letter. De Pani filed suit against Avatar seeking to foreclose on a construction lien [Footnote omitted] (Count 1), requesting damages for breach of contract (Count 2), and for declaratory relief asking the court to determine whether the termination provisions of Article 67 were modified by the addenda to eliminate Avatar's right to terminate De Pani without cause (Count 3).

The trial was bifurcated and the parties agreed to present the issues contained in the count for declaratory relief to the trial judge. In the Order on Count for Declaratory Relief, the trial judge ruled in favor of De Pani. Specifically, the lower court determined that: (1) the specific language in the addendum controlled over the general rights for termination in the Master Contract; (2) an ambiguity existed between Article 67 in the Master Contract and the language of Addenda 3 and 4; (3) the ambiguity must be resolved against Avatar; (4) the unilateral, termination provision contained in Article 67

was illusory and unfair because it lacked in mutuality of obligation; (5) Avatar violated the implied covenant of good faith; and (6) Avatar was precluded by equitable principles from exercising the termination provision of Article 67. We find that the case must be reversed on the claim for declaratory relief.

Article 67 is a valid and enforceable unilateral termination clause as it required Avatar to provide "at least ten (10) days prior written notice," which constituted sufficient consideration. *See Sugar Cane Growers Coop. of Fla., Inc. v. Pinnock,* 735 So.2d 530 (Fla. 4th DCA 1999). Moreover, the termination clause contained in Article 67 of the Master Contract and the language of Addenda 3 and 4 do not conflict. Rather, the two clauses create mutuality of termination. The language in Addenda 3 and 4 permits De Pani to avoid the contract in the event that the price term is rendered onerous by the passage of time. If the price term does become onerous, then De Pani can terminate the contract by providing 30 days notice. Avatar needed no similar escape clause in the event of declining prices because it already had its rights under Article 67. Even if there was no mutuality of termination, Florida courts have upheld the unilateral right of one party to cancel a contract as long as consideration exists. *See Rollins Servs. v. Metro. Dade County,* 281 So.2d 520 (Fla. 3d DCA 1973); *see also Murry v. Zynyx Mktg. Communications, Inc.,* 774 So.2d 714, 715 (Fla. 3d DCA 2000).

Each addendum provided for "all of the terms and conditions of the Master Construction Agreement" that do not directly conflict with the addenda to remain in full force and effect and be incorporated in the addenda. All terms in the Master Contract and addenda can co-exist without conflict; therefore, there is no need to elevate one provision over another. The subsequent addenda, which contained prices fixed for a period of time, provided a term of years for the addenda and included an automatic renewal provision, did not modify or eliminate the termination provision in Article 67. [Footnote omitted]

The trial judge found that Avatar violated the implied covenant of good faith and fair dealing in terminating the contract pursuant to Article 67. However, the covenant of good faith cannot be used to create a breach of contract on Avatar's part, where there was no breach of any express term of the contract. As this Court explained in *Indian Harbor Citrus, Inc. v. Poppell,* 658 So.2d 605 (Fla. 4th DCA 1995), an implied covenant of good faith cannot be used to vary the unambiguous terms of a written contract and when parties negotiate "a fully specified, unambiguous contract, this court is not at liberty to change their bargain." *Id.* at 607. The "duty of good faith must relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements." *Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.,* 710 So.2d 573, 574 (Fla. 4th DCA 1998). The language of Article 67 was plain and unambiguous: Avatar could terminate the contract at any time for any reason. It was a valid

contract with an enforceable termination clause. Avatar complied with the terms of Article 67 in the Master Contract when it terminated De Pani. Avatar's ulterior motive for De Pani's termination has no relevance as Article 67 of the Master Contract provided Avatar with the right to terminate De Pani at any time. *See A.J. Temple Marble & Tile, Inc. v. Long Island R.R.,* 256 A.D.2d 526, 682 N.Y.S.2d 422 (N.Y.App.Div.1998). Florida law required nothing more of Avatar.

REVERSED and REMANDED.

POLEN, C.J. and STONE, J., concur.

Notes

22. Readers may recall discussion of construction liens from Chapter 3. These are rights to sell something in the case that another party's duty to pay has been breached. The property law analogy is the real estate mortgage, which allows the mortgagee (usually the lending bank or investor) to conduct a judicial or private sale of real property to collect owed money where the debtor fails to properly pay. Holders of such liens may bring an action for foreclosure, i.e., court recognition of the right to sell in case of breach. The note is loan agreement, and the mortgage is the right to force a sale if the note/loan agreement is breached.

23. Readers may also recall something in the *Insurance Concepts and Design, Inc.* case from Chapter 4 which detailed that implied duties cannot be imposed where they conflict with an express condition. This demonstrates that Florida courts tend to adhere to a somewhat rigid procedure, i.e., that they avoid implication of duties like those of good faith where the imposition of such would directly conflict with an express term or condition in a contract.

24. In the Avatar *Development Corp*. case, the aggrieved party threatened with foreclosure sought declaratory relief. Just to remind, this is a type of equitable relief (Chapter 12) whereby an aggrieved party asks a court to rule that some perceived right of the other, such as the exercise of the right to terminate, may not be exercised (for whatever reason). As you can glean, this is indeed a mechanism that intends to avoid forfeiture.

Problem 20-1

Homeowner contracts with Painter to paint the interior of her home at 12:00 p.m. on January 15 for $1,000. Homeowner, being suspicion of strangers being alone in her house, tells Painter that she will be there to oversee his work, as well as unlock the door and let him in. On the morning of January 15, Homeowner decides that she does not feel comfortable having a stranger in her home, so she locks all of the doors and turns off the lights. Painter gathers all of his materials, tools, and arrives at noon on January 15 to begin painting the home. When Painter arrives, Homeowner refuses to let him in or pay him the $1,000. Has Homeowner breached the implied duty of cooperation or good faith? Explain your answer.

3. Waiver

A. Requirements for Waiver

WINANS v. WEBER

District Court of Appeal of Florida, Second District, 2007

979 So. 2d 269

STRINGER, Judge.

Gordon and Kathy Winans appeal the final judgment on interpleader which awarded Jed Weber, M.D., the full amount of his bill for medical services rendered. Because the trial court's findings are not supported by the evidence presented at the hearing and because the evidence does not establish that the Winanses waived their rights as third-party beneficiaries under the contract between Dr. Weber and United HealthCare, we reverse and remand for entry of judgment in favor of the Winanses.

The factual context of this case requires some explanation. In mid-2003, Dr. Weber entered into a contract with United HealthCare to be a provider of medical services to United HealthCare's customers. The scope of this contract was stated in the first paragraph:

> This agreement applies to you and the services you provide *in all of your practice arrangements and for all of your tax identification numbers*, except if your services are covered under an agreement between us and a medical group that you are part of.

(Emphasis added.) Subsequent provisions of the contract stated:

> You must submit your claims within 90 days of the date of service ... If your claim ... is not submitted within these

> timeframes, you will not be reimbursed for the services, and you may not charge your patient.
>
> * * * *
>
> *You will not charge our customers anything for the services you provide, if those services are covered services under their benefits contract*, but the applicable co-pay, coinsurance or deductible amount. *If the services you provide are denied or otherwise not paid due to your failure to notify us, to file a timely claim*, to submit a complete claim, or based on our reimbursement policies and methodologies, *you may not charge your patient*.

(Emphasis added.) The contract defined "customer" as an "individual[ ] who [is] enrolled in benefit contracts insured or administered by us."

Gordon Winans was involved in an auto accident in April 2003. At that time, Mr. Winans had health insurance through United HealthCare and was a "customer" as that term is defined in the contract between Dr. Weber and United HealthCare. In May 2003, Mr. Winans was referred to Dr. Weber by the Winanses' attorney for treatment for the injuries Mr. Winans sustained in the auto accident. His treatment continued through 2003, 2004, and 2005.

Shortly after Mr. Winans began treating with Dr. Weber, the Winanses' attorney sent Dr. Weber a Letter of Protection ("LOP") concerning the medical bills being incurred by Mr. Winans. This LOP specifically required Dr. Weber to submit bills for Mr. Winans' treatment to Mr. Winans' health insurer "in the event there is available insurance coverage that your office accepts." The LOP stated that if the bills were submitted to the insurance carrier and if those bills were not paid, then the bills would be paid from the proceeds of the settlement.

At some point after Dr. Weber received the LOP, his office stamped the LOP with an addendum which read, in full,

> "Jed. P. Weber, M.D., Neurosurgery Consultants, L.L.C." is not contracted with any insurance companies. Therefore, Provider will neither bill, nor accept payment from Health Insurance. Provider will rely on LOP, PIP, MedPay, and if no settlement is reached, the Patient for payment.

Mr. Winans' signature appears below this stamped addendum. The addendum is not dated, and there is nothing in the record showing when the addendum was placed on the LOP or when Mr. Winans signed it.

In keeping with the addendum, Dr. Weber did not submit any bills for Mr. Winans' treatment to United HealthCare. Dr. Weber's bill for his services in treating Mr. Winans was $28,064. It is undisputed that had Dr. Weber submitted Mr. Winans' bills to United HealthCare for payment, he would have received $4,167.15 in full payment for all treatment rendered.

Following the Winanses' settlement of their personal injury case, Dr. Weber sought to be paid $28,064 from the settlement proceeds pursuant to the LOP. The Winanses contended that Dr. Weber was not entitled to any payment because he should have submitted his bills to United HealthCare and because, under his contract with United HealthCare, he was prohibited from collecting from the Winanses any amounts that he should have received under that contract.

When the parties could not amicably resolve the dispute over these funds, the Winanses' attorney paid the disputed funds into the court registry. Dr. Weber and the Winanses then filed competing motions for disbursement of the funds in the court registry. The trial court held an evidentiary hearing on the motions.

At that hearing, Mr. Winans testified that when he first visited Dr. Weber, he told Dr. Weber's office staff that he had United HealthCare insurance. Mr. Winans testified that he was told on several occasions by Dr. Weber's office staff that his bills were being submitted to United HealthCare. Mr. Winans admitted that he signed below the stamped addendum on the LOP, but he testified that he thought that Dr. Weber was still billing United HealthCare because the body of the LOP stated that Dr. Weber was required to bill his health insurance carrier before he would be protected by the LOP. Nowhere did Mr. Winans testify that he discussed the addendum to the LOP or signing the addendum with his attorney. In fact, Mrs. Winans testified that the first their attorney knew of the addendum was in July 2005 when Dr. Weber's bill was submitted to him for payment out of the settlement proceeds.

Dr. Weber did not testify at the hearing. However, his practice manager, Catherine Nicholson, testified that Dr. Weber had two separate companies set up with two separate tax identification numbers. According to her, Dr. Weber treated all of his nonaccident patients under one tax identification number and all of his auto accident patients under a different tax identification number. Nicholson testified that for all of the auto accident cases, the patients were required to sign the addendum that says that Dr. Weber would not accept health insurance. She testified that if a patient refused to sign, Dr. Weber would not treat that patient. Nicholson testified that Dr. Weber had not submitted any of the bills for Mr. Winans' treatment to United HealthCare in reliance on the addendum and that the time had now passed for the bills to be timely submitted for payment. Nicholson denied that she had ever told Mr. Winans that his bills were being submitted to United HealthCare. She did not

address whether any other member of the office staff might have told this to Mr. Winans.

On cross-examination, Nicholson admitted that Dr. Weber's contract with United HealthCare stated that it applied to all tax identification numbers and to all practice arrangements. However, she also testified that only Jed Weber, M.D., P.L., was a party to the contract and that Neurosurgery Consultants, LLC, was not a party to the contract.

At the close of the hearing, the trial court found that there was a contract between Dr. Weber and United HealthCare and that it applied to all of the services provided by Dr. Weber under all of his tax identification numbers, thus rejecting Dr. Weber's argument that his separate auto accident practice was not subject to the terms of his contract with United HealthCare. The trial court also found that the contract prohibited Dr. Weber from charging his patients for bills covered under the patients' contracts with United HealthCare. The trial court also found that Mr. Winans was a third-party beneficiary of the contract between Dr. Weber and United HealthCare.

However, the trial court then found that Dr. Weber had explicitly stated that he did not accept health insurance and that he had “chosen not to extend” insurance benefits to his patients. Based on this, the trial court found that Mr. Winans had “cut off” his third-party rights under the contract by signing below the stamped addendum with the advice of counsel. Thus, the trial court found in favor of Dr. Weber and ordered the full amount of the disputed proceeds disbursed to him.

In this appeal, the Winanses contend that the trial court erred in finding that Mr. Winans signed the addendum with the advice of counsel because there is no evidence to support this finding. They also contend that the trial court erred in finding that Mr. Winans' signature constituted a waiver of his rights as a third-party beneficiary of the contract between Dr. Weber and United HealthCare. We agree with both points.

As an initial matter, the Winanses are correct that there is no record evidence to support the trial court's finding that Mr. Winans signed the addendum with the advice of counsel. Mr. Winans did not testify that he ever spoke with his attorney about the matter. Mrs. Winans testified that their attorney did not know about the addendum until after treatment was completed. Dr. Weber did not testify, and his practice manager did not testify on this issue. Therefore, the trial court's finding that Mr. Winans signed the addendum after consultation with and on the advice of counsel is not supported by the evidence in the record.

Turning to the legal arguments, we agree with the Winanses that Dr. Weber did not prove that they waived their rights as third-party beneficiaries under

the contract between Dr. Weber and United HealthCare. The supreme court has defined a “waiver” as a voluntary and intentional relinquishment of a known right. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla.2005). The elements that must be established to prove waiver are the existence at the time of the waiver of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage. *Arbogast v. Bryan*, 393 So.2d 606, 608 (Fla. 4th DCA 1981) (quoting 22 Fla. Jur.2d, Estoppel & Waiver, § 89). The element of knowledge of the right is critical, and there can be no waiver without knowledge of the existence of the right or privilege to be waived. *Gulf Life Ins. Co. v. Green*, 80 So.2d 321, 322 (Fla.1955). Similarly, there can be no waiver if the party against whom the waiver is invoked did not know all of the material facts, *see Fireman's Fund Ins. Co. v. Vogel*, 195 So.2d 20, 24 (Fla. 2d DCA 1967); *Alston v. Alston*, 960 So.2d 879, 881 (Fla. 4th DCA 2007); or was misled about the material facts, *see L.R. v. Dep't of Children & Families*, 822 So.2d 527, 530 (Fla. 4th DCA 2002) (holding that there could be no waiver of grandparents' right to seek adoption of grandchildren when DCF had misled the grandparents concerning their rights); *cf. Ethridge v. State*, 766 So.2d 413, 414 (Fla. 4th DCA 2000) (holding that defendant could not have been found to have waived right to assert a specific defense when he had been specifically told that the defense was not available).

In this case, the trial court properly found that Mr. Winans had rights under the contract between Dr. Weber and United HealthCare. However, the trial court's finding that Mr. Winans had waived those rights is not supported by the evidence because there is no evidence that Mr. Winans had knowledge of his rights when he allegedly waived them. Instead, the evidence shows that Dr. Weber actively misled Mr. Winans in one of two ways. If Mr. Winans' testimony is to be believed, Dr. Weber misled Mr. Winans by having his office staff assure him that Dr. Weber was billing United HealthCare for his treatment in direct contradiction to the addendum. If the testimony presented by Dr. Weber is to be believed, Dr. Weber misled Mr. Winans by falsely telling Mr. Winans that Dr. Weber was not contracted with any health insurance companies. In either event, Mr. Winans' purported waiver of his rights under the United HealthCare contract was not made with knowledge of the material facts. Thus, any alleged waiver would be ineffective to actually waive Mr. Winans' rights under the United HealthCare contract. Accordingly, the trial court erred in finding that Mr. Winans waived his rights and in disbursing the disputed funds to Dr. Weber.

In this appeal, Dr. Weber contends that the trial court did not rule on the issue of waiver, but rather found in his favor on the basis of equitable estoppel. While we do not read the trial court's ruling this way, even if this were so, we would still reverse because the evidence does not support finding an equitable estoppel. The elements that must be established to prove an equitable estoppel are:

> (1) the party against whom the estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it.

Watson Clinic, LLP v. Verzosa, 816 So.2d 832, 834 (Fla. 2d DCA 2002); *see also SourceTrack, LLC v. Ariba,* Inc., 958 So.2d 523, 526 (Fla. 2d DCA 2007); *Lennar Homes, Inc. v. Gabb Constr. Servs., Inc.*, 654 So.2d 649, 651 (Fla. 3d DCA 1995). There can be no estoppel when the party seeking the estoppel was aware of the true facts and thus was not misled by the other party's conduct. *Watson Clinic*, 816 So.2d at 834; *Schueler v. Franke*, 522 So.2d 904, 906 (Fla. 2d DCA 1988); *Hamilton v. Corcoran*, 177 So.2d 64, 65 (Fla. 2d DCA 1965); *Lennar Homes*, 654 So.2d at 652.

Here, Dr. Weber's claim of equitable estoppel fails for three reasons. First, Dr. Weber failed to prove that Mr. Winans made any type of representation about any material fact. Instead, it was Dr. Weber who made the representation about a material fact, and that representation was false. Because estoppel will only lie against the party actually making the representation, Dr. Weber has failed to establish one of the elements of estoppel.

In his brief, Dr. Weber takes the position that Mr. Winans' signature under the addendum constituted a “representation.” However, the record does not bear this out. The stamped addendum is simply a statement made by Dr. Weber. While Mr. Winans' signature might be construed to be evidence that he read the statement, there is nothing in the addendum that can be construed to make that signature a representation by Mr. Winans that the addendum is true or that he agreed to it. Had the stamped addendum begun with “1 acknowledge that ...” or “1 understand that ...”, then perhaps it would have been possible to construe Mr. Winans' signature as a representation. In the absence of such language, Dr. Weber has no basis for turning the stamped addendum placed on the LOP by his own office staff into a representation made by Mr. Winans.

Second, Dr. Weber cannot rely on equitable estoppel because he himself was aware of the true facts and thus was not misled by any representation by Mr. Winans. The evidence established, and the trial court properly found, that Dr. Weber was aware that he had a contract with United HealthCare that applied to all of his patients who were “customers” of United HealthCare. Despite this, Dr. Weber falsely represented that he was not contracted with any health insurance providers. Dr. Weber cannot seriously contend that he was “misled” by Mr. Winans' conduct when Dr. Weber knew that he had a contract with United HealthCare and knew that Mr. Winans was a “customer” of United

HealthCare entitled to the benefits of that contract. Because Dr. Weber was aware of the true facts, he is not entitled to rely on the doctrine of equitable estoppel to extricate him from his own falsehood.

Third, Dr. Weber's equitable estoppel argument flies in the face of the purpose of the doctrine. The primary purpose of the doctrine of equitable estoppel is to "prevent a party from profiting from his or her wrongdoing." *Major League Baseball v. Morsani*, 790 So.2d 1071, 1078 (Fla.2001). Thus, a party's own wrongful act cannot serve as the basis for a claim of equitable estoppel against another. *Barnett & Klein Corp. v. President of Palm Beach-A Condo., Inc.*, 426 So.2d 1074, 1075 (Fla. 4th DCA 1983); *Opler v. Wynne*, 402 So.2d 1309, 1311 (Fla. 3d DCA 1981).

Here, Dr. Weber breached his contract with United HealthCare by attempting to bill patients covered by United HealthCare for charges covered by their policies. He also misled his patients concerning the existence of the contract between himself and United HealthCare. Dr. Weber now seeks to use these wrongful acts to estop the Winanses from receiving the benefits they were entitled to under their policy with United HealthCare. Dr. Weber cannot claim detrimental reliance on his own misrepresentations and his own wrongful breach of his contract with United HealthCare.

For these three reasons, Dr. Weber's claim of equitable estoppel fails. Because Dr. Weber established neither waiver nor equitable estoppel, the trial court's finding that Mr. Winans had "cut off" his rights under the contract between Dr. Weber and United HealthCare cannot stand. Accordingly, we reverse the order disbursing the disputed funds to Dr. Weber and remand for disbursement of the funds to the Winanses.

Reversed and remanded for entry of judgment in favor of the Winanses.

B. Disclaiming Waiver

PHILPOT v. BOUCHELLE

District Court of Appeal of Florida, First District, 1982

411 So. 2d 1341

ERVIN, Judge.

Philpot (the lessor) appeals from a final judgment entered in accordance with a jury verdict finding him in breach of a lease/option to purchase contract. Philpot contends that the trial court erred in refusing to grant his motions for directed verdict. We agree and reverse.

First, we reject the appellee's argument that the appellant did not properly preserve the issue for review. The record reveals that the appellant made a motion for directed verdict both at the close of the appellee's case-in-chief and at the close of the case. Additionally, he renewed his motion at the charge conference after all the the evidence had been presented. Therefore, the issue has been preserved. *See 6551 Collins Avenue Corp. v. Millen*, 104 So.2d 337 (Fla.1958).

As to the merits of the appeal, the record reveals that on or about June 10, 1979, the parties entered into a 12-month lease agreement providing for the rental of Philpot's condominium unit, which agreement, by its terms, extended from June 15, 1979 to June 14, 1980. The appellee agreed to pay the annual sum of $5,400, in increments of $450 per month, beginning the 15th day of each month. Paragraph 14 of the lease provided that appellee could exercise his option to purchase from November 15, 1979 to April 15, 1980. The appellee was to provide $1,000 in consideration in the form of personal note that was payable within 90 days to the appellee. It was also provided that the lessee/appellee was to spend a minimum of $2,500 for the purpose of installing carpeting, window tint, sun shading, interior painting, double glass thermal, and noise resistant windows within five months after the execution of the lease. And the lessee was required as of November 15, 1979, to furnish the lessor with "satisfactory evidence" of $2,500 worth of completed improvements. If these improvements were not documented by that date, the option was to be null and void.

Paragraph 15 of the contract provides:

> The rights of the lessor under the foregoing shall be cumulative and the failure on the part of the lessor to exercise properly any rights given hereunder shall not operate to forfeit any of the said rights.

(e.s.)

Paragraph 16 of the contract further provides: "It is understood and agreed between the parties hereto that time is of the essence of this contract and applies to all terms and conditions contained herein."

The appellee wrote to the appellant on April 11, 1980, informing him that he desired to exercise the option. The appellant replied by letter dated April 16, 1980, that the appellee had not satisfied the conditions precedent to the permissible exercise of the option due to his failure to pay timely the monthly rental amounts, and to install no less than $2,500 in improvements to the unit pursuant to the terms of the agreement. The appellee, under threat of eviction, moved out of the condominium on June 23, 1980. Shortly thereafter,

the appellee sued for breach of contract. The case then proceeded to a jury trial.

The appellee's case-in-chief at trial consisted primarily of his testimony. He testified that he substantially accomplished all the conditions of the lease and the option. Although he admitted that his rent payments and the payment on the note had been late, he stated that the appellant had accepted all of his late payments "graciously." He also admitted that all of the $2,500 worth of improvements had not been completed by November 15, 1979, but that he did have all the improvements under contract at that time. He testified that he had replaced the carpets in the condominium, which constituted the major share of the $2,500 by the time he moved into the condominium in June, 1979, and that he had returned the old carpets to the appellant. He admitted, however, that the appellant did not actually see the new carpet installed inside the condominium, or know its exact cost. The appellee's wife nevertheless testified that the appellant's wife had seen it within the unit. The appellee also testified that he ultimately made over $2,500 worth of improvements to the condominium, and he furnished documentation of these improvements when requested by the appellant in his letter of April 16, 1980. The other improvements consisted of vinyl tiling work and new curtains. According to the appellee, the appellant never warned him that his late performance caused a forfeiture of the option until the appellee received the April 16 letter from the appellant. The appellee, moreover, testified that he did not notice the appellant had endorsed the reverse side of his rent payment checks with limited endorsements to the effect that the payments were accepted under protest; that the option was considered null and void; that the lease had been broken and that the appellant now considered the rental to be on a month-to-month basis. Although he did not scrutinize the endorsements, he admitted that his accountant normally processed his checks and thoroughly reviewed them.

The appellant testified in defense that the purpose of the conditions of the options, which was communicated to the appellee at the time of the execution of the lease, was to provide assurances to appellant by November 15, 1979, that the appellee intended to exercise the option in order for appellant to purchase other property in New Port Richey. He did not deny that he allowed tardy performance on the early rent payments and on the note; however, in January, 1980, he informed the appellant that the option in the lease had been broken because of the appellant's untimely payments. At that time, the appellee tendered late checks for the October, November and December rental months. The appellant also admitted that while he suspected the appellee had placed new carpeting in the condominium, he did not have any actual knowledge of this prior to April, 1980.

If not for paragraph 15 of the parties' contract, we would agree that the issue as to whether the appellant waived the conditions necessary to the exercise of

the option was a jury question and that there was competent, substantial evidence supporting the jury's decision. The law is clear that a lessor is estopped to assert a forfeiture for a breach of covenant or condition in a lease, or waives his right to such a forfeiture, if, after the breach of covenant, he accepts rent from his tenant with knowledge or full notice thereof. *Farmers' Bank and Trust Co. v. Palms Pub. Co.*, 86 Fla. 371, 98 So. 143 (1923); *Moskos v. Hand*, 247 So.2d 795 (Fla. 4th DCA 1971). Even when time is made of the essence of a contract, such provision can also be waived by the party to whom the benefit inures. *Shouse v. Doane*, 39 Fla. 95, 21 So. 807 (1897).

The difficulty in applying the above rule to the case before us is that the parties contractually agreed in paragraph 15 that the acceptance of late performance by the lessor would not constitute a waiver of the lessor's rights. Thus, the lessor, by accepting appellee's late performance, can hardly be considered as dealing inconsistently with the terms of the contract.

We consider that the parties contractually modified the common law rules of waiver and estoppel, and their modification does not conflict with any public policy. We have found no Florida cases, nor have the parties cited any, which deal with a clause such as the one provided in paragraph 15 of the lease. Other jurisdictions, however, have upheld the validity of clauses similar to those stated in paragraph 15. *See Karbelnig v. Brothwell*, 244 Cal.App.2d 333, 53 Cal.Rptr. 335 (1966*); In re: Wil-Low Cafeterias, Inc.*, 95 F.2d 306 (2d Cir. 1938), *cert. denied*, 304 U.S. 567, 58 S.Ct. 950, 82 L.Ed. 1533; *Vintaloro v. Pappas*, 310 Ill. 115, 141 N.E. 377 (1923*); U. S. A. Petroleum Corp. v. Jopat Building Corp.*, 343 So.2d 501 (Ala.1977). *Karbelnig v. Brothwell*, *supra*, is particularly instructive. There a lower court held that the lessor's acceptance of the lessee's late payment of rent constituted a waiver of the contractual terms regarding breach. The lower court arrived at this conclusion even though paragraph 27 of the lease contract provided as follows:

> WAIVER. A waiver by Lessor of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Lessor shall not be deemed to be a waiver of any preceding breach by Lessee of any term, covenant or condition of this lease, other than the failure of lessee to pay the particular rental so accepted, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such rent.

In its reversal, the California appellate court concluded:

> The express agreement on the part of the lessees, which was

> binding upon the assignees, to the effect that the acceptance of rent by the lessor after knowledge of the breach of a covenant should not be deemed a waiver of such breach, is tantamount to a relinquishment of the right of the lessees and their assignees, to assert a waiver of estoppel, unless there has been an express waiver on the part of the lessor of the right reserved, or there has been conduct on the part of the lessor, other than the acceptance of rent, upon which the lessees or their assignees could lawfully assert an estoppel or declare a forfeiture.

Karbelnig, *supra*, at 53 Cal.Rptr. 341.

The court found that the lessor had not expressly waived his rights and had done nothing-other than the acceptance of the late rent-upon which an estoppel could be asserted.

Similarly, in the instant case, the appellant/lessor did not expressly waive any of his rights, and the only substantial evidence of implied waiver was his acceptance of late rental payments, and acceptance of improvements to the condominium unit-actions which were not inconsistent with the language of paragraph 15 of the contract. That language is arguably broader in its effect than the language provided in paragraph 27 of the lease involved in Karbelnig, as the former applies to the non-forfeiture of “any rights”-not just the acceptance of untimely rent.

To conclude, because Philpot acted consistently with paragraph 15 of the contract, he cannot be deemed to have waived the appellee’s failure of performance. Therefore, Philpot was correct in his position that the conditions of the option to purchase had not been satisfied. Accordingly, the trial court should have granted Philpot’s motion for directed verdict as he was not in breach of contract.

Because of our holding on the above point, appellant’s third point concerning rejected jury instructions is now moot.

Reversed and remanded for further consistent proceedings.

McCORD and SHAW, JJ., concur.

C. Public Policy Behind Waiver Practice

SEPKO v. PROVIDIAN AUTO & HOME INSURANCE CO.

District Court of Appeal of Florida, Fourth District, 1999

748 So. 2d 322

KLEIN, J.

Appellant, the insured, appeals a summary judgment holding that his automobile insurance had been canceled and that he was therefore without coverage for an accident. We affirm.

The insured relies on *Bergdorf v. Allstate Insurance Co.*, 541 So.2d 716 (Fla. 4th DCA 1989) in which, prior to an accident, the insurer had, on six different occasions, reinstated a policy after canceling it for non-payment of premium. In a split decision, we held that the insurer had "established a uniform conduct of doing business" so as to allow the insured to rely on it, and there was coverage for an accident which occurred about three weeks after the policy had been canceled, and about two weeks after the insured had paid the premium. Judge Stone dissented, seeing no reason to reward the insured, who had been chronically late in paying.

In the present case, a notice of cancellation dated November 25, 1997 notified the insured that the policy would be canceled if payment of the premium were not received by December 11, 1997. No check was received by the insurer by December 11, 1997 and the accident occurred on December 14, 1997. On one prior occasion, the premium payment had not been received by the insured until after the cancellation date, but the insurer had reinstated the policy.

The insurer argues, and we agree, that one prior reinstatement of the policy does not establish the course of conduct necessary to bring this case within Bergdorf. Automobile liability insurance is mandatory in Florida, and when insurers are lenient with policy holders who do not timely pay their premiums, it advances Florida's public policy requiring vehicles to be insured. Reinstatement should be encouraged, not discouraged. If we were to hold that the insurer's conduct in this case would estop it from denying coverage, it would have the effect of causing insurers to not reinstate, thus leaving more vehicles uninsured. Affirmed.

GUNTHER and FARMER, JJ. concur.

Problem 20-2

Supermarket Inc. purchases all of its fresh produce from Market Co., and the two businesses have a written contract for monthly deliveries to Supermarket Inc. by the 1st of each month. The businesses included a provision in the contract that provides, "If any change to the delivery date is to be made, it must be made in writing to be enforceable in the contract as between the parties." Three years into their contract, Market Co. calls Supermarket Inc. and says, "Would it be okay if we delivered our monthly shipment this month

on the 5th instead of the 1st?" Supermarket Inc. then said, "Of course. It's not a problem." Market Co. continues delivering the monthly shipments on the 5th for the next four months. Supermarket Inc. soon discovers a less expensive produce purveyor and wants to attempt to get out of the contract due to Market Co. not delivering the shipments on time according to the terms of the contract. Will Supermarket Inc. be successful in proving breach? Would your answer change if Supermarket Inc. had contacted Market Co. and requested a return to the 1st of the month shipping date prior to attempting to cancel the contract? Explain.

Notes

(49) The Restatement (Second) Contracts and the U.C.C. in Article 2 (as well most likely the state's adoption of same) both contain a special provision for executory contracts. As may be recalled, executory contracts are longer-term contracts that involve continuing obligations by the parties involved. Restatement (Second) Contracts § 84(2); U.C.C. § 2-209(5); FLA. STAT. § 672.209(5) (2017). Where a condition requiring continued performance (such as timely payment of monthly premiums) is waived, the party to whom it is owed may reinstate such requirement if two conditions are met: (1) notice of reinstatement is sent within a reasonable time before the (next) duty is owed; and (2) the party owing the performance had not detrimentally relied on the expectation that the waiver of such condition would be effective forever after.

(50) Readers should take note that there is a Statute of Frauds (merchants and modification of contracts under Florida law) correlation with the previous problem.

(51) Most cases (and casebooks) usually utilize the term "waiver and estoppel" as a singular term. Although the two concepts are similar, they are distinctly different in their applications and, thus, their results. The *Enfinger* case that follows may help to illustrate the differences between the two concepts and when each may be applied.

D. Difference Between Waiver and Estoppel

Readers may have noticed that the court in the *Philpot v. Bouchelle* case above addressed the equitable estoppel as well as the waiver argument. Some further clarification is appropriate. As a lesson in using proper terminology, focus on two actions: one by a party to a contract that is being challenged, and

one by the court to respond to the request for relief. One is the action, the other is the justification for the action.

ENFINGER v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

District Court of Appeal of Florida, First District, 1963

156 So. 2d 38

HOBSON, Associate Judge.

Appellant, Margaret Enfinger, brought her action to recover the principal amount of an insurance policy issued by the appellee upon the life of her deceased husband. The cause was submitted to the trial court upon an agreed statement of facts which reveals the following salient points.

Decedent, James W. Enfinger, first applied for membership in The Order of United Commercial Travelers of America on February 24, 1954. He was accepted as a member of March 17, 1954, and certificate of insurance #548851 was issued insuring him against accidental injury and death. When Mr. Enfinger failed to pay his quarterly dues and assessments for the period commencing September 1, 1960, he was automatically suspended from the benefits of his lodge and his certificate of insurance on October 1, 1960, pursuant to Article 11, § 8 of the Order's Constitution. The aforesaid section provides for automatic suspension when Mr. Enfinger failed 'to restore himself and his certificate to good standing within 30 days from the date of such delinquency.' On January 26, 1961, more than 90 days after his suspension, Mr. Enfinger applied for reinstatement. He was required to complete a form reinstatement application. This form contained the following printed disclaimer:

> '* * * and that the Order shall not be liable for any accidental injury or death happening prior to the issuance of a Certificate or Certificates of Insurance by said Order.'

Mr. Enfinger's application was received by the local council on January 26, 1961, together with his fee in the amount of $9.20. Said $9.20 consisted of $2.50 local council dues, $2.70 insurance assessment for February and March, 1961, and $4.00 insurance assessment for April, May and June, 1961. Pursuant to a favorable committee report, Mr. Enfinger was elected to membership in the local council on January 31, 1961. The pertinent provision of the Order's constitution which provides for reinstatement of cases such as Mr. Enfinger is as follows:

'Each application shall be referred to a [local] Committee of three for investigation, upon whose report a ball ballot shall then be taken upon each

application, and if not more than two adverse ballots appear, the Senior Counselor [also local] shall declare the applicant *reinstated to membership, subject to the approval of the Supreme Office*.' Art. 11, § 9. (Italics supplied.)

The Supreme Office is located in Columbus, Ohio.

The local chapter performed as required by the above constitutional provision and forwarded Mr. Enfinger's application for reinstatement to the Supreme Office for its approval on January 31, 1961. On February 3, 1961, the Supreme Office received and acknowledged receipt of the insurance funds paid in behalf of Mr. Enfinger. Mr. Enfinger came to his death by accidental drowning on February 4, 1961, before the Supreme Office had actually approved his application. Without knowledge of his death, on February 8, 1961, his application was unqualifiedly approved by the Supreme Office and his insurance certificate was issued bearing the number 548851, as had his original insurance certificate. The insurance certificate was not delivered and on demand the company refused to honor the same on the ground that Mr. Enfinger had died before the approval of his reinstatement application. In denying Mrs. Enfinger's claim, the company relies upon the portion of the Order's constitution which provides, 'The right of any such applicant or his beneficiary to fraternal privileges of the Order or indemnity under the provisions of Article 11, shall not accrue until twelve o'clock noon, Eastern Standard Time, of the day upon which his certificate of reinsurance is dated.' Article 2, Section 9.

Subsequent to Mr. Enfinger's death, on February 17, 1961 the Supreme Office forwarded the insurance assessment for April, May and June, 1961, in the amount of $4.00 to the local council for return to decedent's estate; however, it was not until more than 14 days after the complaint was filed that the insurance assessment for February and March, 1961, and local dues were tendered to the appellant.

The trial court upon consideration of the agreed statement of facts and argument of the parties in interest entered a judgment in favor of the appellee denying appellant's recovery under the policy of insurance.

We have carefully examined the agreed statement of facts, as well as the briefs of the parties herein. From our scrutiny of the path followed by Mr. Enfinger's application for reinstatement, it is clear that the bulk of the requisite steps leading to reinstatement had been completed on or before his accidental death on February 4, 1961. The record reflects that on or before February 3, 1961, Mr. Enfinger's application for reinstatement, appropriately endorsed by two members in good standing, had been duly submitted to the local council of the Order; it had been approved by a three-member membership committee; he had been reelected to membership in the Order; the local council had issued to Mr. Enfinger a membership card showing him to be 'a member in good standing'; his approved application form, together

with the insurance assessments for February through June had been forwarded to the national office of the Order and the national office of the Order had acknowledged receipt of Mr. Enfinger's assessments along with the other reports and funds submitted by the local council. Nothing was left for Mr. Enfinger to do. He had met all requirements. The only thing remaining undone prior to Mr. Enfinger's death was the perfunctory task on the part of the Supreme Council of physically issuing and delivering the insurance policy in question. Lest this statement be mistakenly considered unwarranted, it must again be pointed out that between Mr. Enfinger's death on February 4th and receipt of notice thereof by the Order's home office decedent's policy of insurance actually was issued in the routine course of business on February 8, 1961. Moreover, it is quite clear that Mr. Enfinger was not guilty of any fraud or misrepresentation; otherwise the Supreme Office would not have approved the application. No basis for disapproval of said application has even been suggested.

The agreed statement of facts discloses that appellant's decedent submitted two insurance assessment payments to the Order's home office. The first assessment of $2.70 was intended to provide insurance coverage for the months of February and March, 1961, and the second assessment was advance payment to cover the months of April, May and June, 1961. The inescapable conclusion from the division of the assessment costs is that both parties intended that the entire month of February would be covered by the premium of $2.70.

Under the appellee's customary mode of procedure, which is prescribed by its constitution, all the money which had been collected by the Secretary-Treasurer of each local chapter is remitted to the Supreme Office of the Order once a month on the first day of each month. (Art. 11, Section 10) If the appellee's contention of no coverage until the policy is actually issued is followed and applied to all cases of reinstatement, the applicants are deprived of any benefit for the premiums paid for a portion of the month of their reinstatement and the appellee is being paid for a risk that it did not incur. This is true because the appellee does not consider itself bound on the policy until noon of the date of issuance which is always subsequent to the first day of the month, yet nevertheless collects premiums covering each and every day of that month. This being so, the appellee cannot at this late date assert that the policy did not become effective until February 8, or defend on the ground of forfeiture. As the Supreme Court of Pennsylvania pointed out in the case of *MacDonald v. Metropolitan Life Insurance Co.*, 304 Pa. 213, 155 A. 491, 77 A.L.R. 353,

'In the absence of an express agreement to the contrary, premiums will be so applied as to give the insured the protection for which he pays. 'A construction which gives insured insurance for a less period of time than that covered by the premium which he has paid should not be adopted.' 32 C.J.

1165.'

Our decision that appellant as the beneficiary is entitled to recover the principal amount of the policy is further buttressed by more than one salient fact disclosed by the agreed statement of facts.

It should be noted that the appellee's conduct after it had full knowledge of Mr. Enfinger's death supports appellant's recovery. The agreed statement of facts reflects that after receiving notice of Enfinger's death, the appellee transmitted (on February 17, 1961) to the secretary of the local order its check for $4.00 for delivery to the estate of the decedent. Said $4.00 represented a return of decedent's insurance assessments covering the months of April, May and June, 1961. It was not until 14 days after the appellant filed her suit as beneficiary that on June 27, 1961, the appellee transmitted to its local secretary a check for $2.70, which represented insurance premiums for the months of February and March, 1961.

The appellee's receipt and retention of decedent's assessments covering the entire month of February, for such a long time after Enfinger's death with full knowledge of said death constitutes a waiver precluding its present denial of liability upon the basis of a forfeiture. The fact that equity abhors forfeitures is apodictic. But let it not be forgotten that the law does not favor them. *Nash Miami Motors, Inc. v. Bandel*, Fla., 47 So.2d 701; *Supreme Lodge K P v. Wellenvoss*, 119 F. 671, 56 C.C.A. 287.

If we were compelled to turn our decision upon the restrictive language of the contract between Mr. Enfinger and the Order, which contract is comprised of the provisions of the Order's Constitution and the specific proviso contained in the application form hereinbefore set forth, we would probably be required to uphold appellee's contention that the Order cannot be held liable because Mr. Enfinger's death occurred prior to the 'perfunctory' approval by the Supreme Office. However, the agreed statement of facts precludes us from writing finis at this juncture. We find present in this case all the requisites for invocation of the principle of estoppel by waiver or perhaps more accurately stated estoppel resulting from a waiver.

Waiver of a forfeiture may be asserted and relied upon in law as well as in equity. [Footnote omitted]. It simply means that when one has waived a forfeiture he is estopped from further reliance upon it.

We recognize the fact that the doctrines of waiver and estoppel are not synonymous. [Footnote omitted] However, they are frequently closely related.

Estoppel may be established in many ways. There are various types of estoppel among them being equitable estoppel, estoppel by deed, by matter of record, by matter in pais and estoppel by conduct. On the other hand, waiver, although it is not technically speaking an estoppel may be effected by various

acts and different courses of conduct which operate in the final analysis as an estoppel or at least a quasi-estoppel.

We believe the correct and proper view of estoppel may be stated in the following words: 'Certain admissions are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded.' [Footnote omitted] 'Waiver is the intentional reliquishment of a known right * * *.' [Footnote omitted]

Waiver operates to 'estop' one from asserting that which he might otherwise have relied upon but it is not a true estoppel. 'That kind of waiver which consists merely in renouncing some right, or in ratifying what one might repudiate, is, certainly, no estoppel, though it has been called such. * * *' [Footnote omitted] Call it what you may, the conduct of the appellee herein, which we have pin-pointed, 'bars,' 'estops,' or if you please 'precludes' it from relying upon the asseverated forfeiture. The U. S. Supreme Court has accurately defined the waiver or quasi-estoppel which we find exists under the facts of the instant suit:

'Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, *followed by due conformity on his part*, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.' [Footnote omitted] (Italics supplied.)

It must be borne in mind that this was not an original application for membership in the Order or for an initial certificate of insurance, but was an application for reinstatement to a status previously occupied and to an indemnity formerly existent. The insurance certificate actually dated and issued on February 8, 1961, bore the identical number (548851) which appears on Mr. Enfinger's original certificate. We cannot consider appellee's defense anything more nor less than reliance upon a forfeiture.

The Order had knowledge of the facts constituting the forfeiture. The forfeiture was complete and absolute. In effect, the Order said to Mr. Enfinger: We will waive the forfeiture and reinstate your membership and your insurance policy upon certain conditions. Mr. Enfinger fulfilled all of the conditions required of him. As aforestated, the only act left to be done was for the Order to deliver the executed, approved and dated certificate. This it failed and refused to do upon learning of Mr. Enfinger's death. As has been noted complete performance by both parties of a specific agreement to waive a forfeiture is not always necessary. Moreover a court may declare a waiver of a forfeiture if, first, the insurer has knowledge of the facts constituting the forfeiture; second, the forfeiture is complete and absolute; third, the insurer takes some course which amounts to an unequivocal act recognizing the

continuance of the policy or which is wholly inconsistent with the forfeiture.

It is crystal clear that the forfeiture created by Mr. Enfinger's failure to pay dues and assessments was complete and absolute. It is likewise certain that the Order had knowledge of the facts constituting the forfeiture. This brings us to a discussion of the unequivocal acts on the part of the Order which we have concluded recognize the continuance of the policy and which are wholly inconsistent with the forfeiture.

One of these acts took place at the 56th Annual Convention of the Georgia-Florida Chapter of the Order which was held at Miami, Florida, on May 11th-12th and 13th, 1961. The council at this late date delivered to its members a brochure containing, among other things, a memorial roster of deceased members for the period April 1st, 1960, to March 31st, 1961, which roster carried the name of the decedent on page 50 thereof as a deceased member. Surely he would not have been so listed had the Order in May, 1961, considered his membership forfeited. Appellee might at this point attempt to make a play on words and say there is a difference between reinstatement to membership and reinstatement of the insurance policy. The fact remains, however, that the requirements for reinstatement to membership are identical to those which are necessary for reinstatement of the insurance policy. They go hand in hand. It is flagrantly inconsistent to say that the approval of the Supreme Council executed and dated February 8, 1961, four days after Enfinger's death, had the effect, which the Order recognized of reinstating Mr. Enfinger to membership but it was ineffective as an approval of the reinstatement of his insurance policy. [Footnote omitted]

The second and primary unequivocal act on the part of the Order which we hold to be a recognition of the continuance of the policy and which is wholly inconsistent with the forfeiture is the receipt and retention by the appellee of decedent's assessment covering the entire month of February, 1961, for a long time after Enfinger's death and until June 27th, 1961, fourteen days after the appellant filed this suit. The assessments for February and March, 1961, were unduly and unwarrantably retained by the Supreme Office of the appellee. It is, we believe, obvious that had there been no suit there would have been no return of the money paid by Mr. Enfinger for the February and March assessments. As was stated uniquely, if not mordaciously, by the Supreme Court of Texas, 'One who places his bets after the dice are thrown is sure to win.' [Footnote omitted]

For the sake of emphasis we repeat the fact that the Order led Mr. Enfinger 'honestly to believe' that if he would perform certain acts 'forfeiture of his policy [would] not be incurred.' He fully complied with the outlined requirements. Thereafter without intervening just cause the Order failed and refused to fulfill its obligation. We cannot believe that any court created for the purpose of administering justice would condone such conduct much less

permit an insurance company to retain for an unwarranted and unreasonable length of time the premium paid; thus avail itself of the benefits of the contract and at the same time escape the liability imposed thereby. Such conduct not only demands the application of the doctrine of waiver but it is unconscionable as well an antithetical to the public policy of this Sovereign State. We are aligned with those of our sister states which hold that as a matter of simple unadorned justice in a case such as this, every doubt should be resolved in favor of the insured.

Our feeling with reference to the contention of the appellee herein can best be epitomized by a quotation from the gifted and ofttimes trenchant pen of Mr. Justice Terrell:

'To permit such a contention to prevail would be to chloroform the element of right and justice on which all such controversies rest and glorify any technical defense offered to defeat it.' [Footnote omitted]

Fiat justicia, rurat coelum.

For the reasons above stated, the judgment of the circuit court is reversed with directions that the trial court enter an appropriate judgment in favor of the appellant herein, including a reasonable attorney's fee for her counsel.

STURGIS, C. J., and RAWLS, J., concur.

CMM Approach: This is a good time to reconsider various "fairness" doctrines now that several have been addressed in cases up to this point. Promissory estoppel entails a promise on which the other party relies, to her detriment, and usually applies when a party argues that there was no proper consideration to support a formed contract. This is what happens with an implied option contract in the situation of a unilateral offer. *See* Chapter 3, Section 1. Equitable estoppel is used where there is no promise, but something that one party has done makes it unfair to hold that a formation element is missing, or a condition has failed, or a contractual duty has been breached. In the *Winans* case above, the unfair thing was not a "promise," but it was a misleading "representation." (The authors would agree with anyone who believed the line between these two to be a thin one). Use of the waiver doctrine is a good example – for example, a party's assertion that late payment terminated its duty may be denied on the basis that past acceptances of late payment lulled the other party into a belief that the condition of timely payment was no longer required. Chapter 16 addressed the use of contractual interpretation to avoid forfeiture in appropriate cases. The case that follows, *Henry v. Ecker*, equates two promises as mutually dependent such that neither may be enforced unless the corresponding promise has been or will be satisfied. The *Henry* case also discusses the equitable defense of *clean hands,*

i.e., if a party seeks an equitable remedy from the courts that party had better have "clean hands." As was discussed in Chapter 12 on Equitable Remedies, there are other bases of recovery, in equity, including *quantum meruit* (which, interestingly, is even awardable to a party that committed the breach in appropriate cases). Much of contracts case law involves avoiding forfeiture and trying to do what is fair. These theories tend to follow particular pathways. Good lawyers identify which ones apply to the specific facts of their cases. Others will include all of the ones they know about in the hope that the court will sort it out and agree with one of them (i.e., the "scattershot approach" – put them all in and pray that one of them hits the target). Many law schools require an advanced course in Equity and Remedies to sharpen understanding of the various concepts.

4. Election

Use of the doctrine of *election of remedies* is admittedly an unlikely possibility. For purposes of being thorough, we address it here although it would be a good fit for Chapter 11 on Remedies. The case that follows demonstrates how this doctrine works. A point to be taken away is that lawyers should make sure to pray for all possible remedies from the very beginning of a dispute at the risk of losing some of them where a court disfavors the kind of forfeiture that may occur to the other party. Respect would probably be earned during proceedings where the argument contains all plausible theories but not truly unlikely, "scattershot" inclusions.

WILLIAMS 5. ROBINEAU
Supreme Court of Florida, 1936
124 Fla. 422

TERRELL, Justice.

S. P. Robineau as trustee filed his bill of complaint in Gilchrist county to foreclose a mortgage, C. H. Williams and Ruth Williams, his wife, J. M. Williams and Rosa L. Williams, his wife, Consolidated Naval Stores Company, and others, were named as parties defendant. C. H. and J. M. Williams, as partners under the firm name of Williams Brothers, filed their answer and cross-bill in which they resist the foreclosure by alleging their ownership of tax deeds covering a portion of the lands described in the mortgage. The cross-bill prays for foreclusure of their tax deeds under chapter 14572, Acts of 1929, Ex.Sess., Laws of Florida.

S. P. Robineau as trustee answered the cross-bill, in which he admitted the tax deeds and the priority of the liens created by them, but resisted their foreclosure on the ground that the lien so created had been legally discharged and exhausted by rents and profits taken from the lands by Williams Brothers

during a period of years they were worked and used by them (Williams Brothers) for turpentine and timber purposes.

After Robineau filed his answer to the cross-bill, Williams Brothers in due course moved to be permitted to amend the latter by striking that portion praying for foreclosure of it under chapter 14572, Acts of 1929, Ex.Sess. This motion was denied, a receiver was appointed, and an examiner was designated to take and report the testimony. Williams Brothers then renewed their motion to be permitted to amend their cross-bill. This motion was denied, and Williams Brothers prosecuted the instant appeal.
Did the chancellor commit error in refusing to permit Williams Brothers to amend their answer and cross-bill to Robineau's bill to foreclose, is the sole question we are called on to answer.

Appellees contend that this question should be answered in the negative for the reason that when Williams Brothers filed the cross-bill and prayed foreclosure of their tax deeds under chapter 14572, Acts of 1929, Ex.Sess., they elected between inconsistent remedies and are now bound by their election. They rely on *Groover v. Stafford*, 107 Fla. 410, 145 So. 252; *Campbell v. Kauffman Milling Co.*, 42 Fla. 328, 29 So. 435; *Ziegler v. Brown*, 112 Fla. 421, 150 So. 608; *McCormick v. Bodek*er, 119 Fla. 20, 160 So. 483; and *Intertype Corporation v. Pulver* (D.C.) 2 F.Supp. 4, to support their contention.

Appellants contend, on the other hand, that this question should be answered in the affirmative because of the liberal provision for amendment contained in chapter 14658, Acts of 1931, § 26, section 4902 (7), Compiled General Laws of 1927, 1934 Supplement, better known as the 1931 Chancery Act. Appellants also contend that what they had in this case was a choice between substantive rights rather than a choice between inconsistent adjective remedies, and being so the law governing the latter has no application in this case.

The distinction between substantive rights and inconsistent remedies is well recognized. *United States v. Oregon Lumber Co.*, 260 U.S. 290, text 307, 43 S.Ct. 100, 67 L.Ed. 261*; Robb v. Vos*, 155 U.S. 13, 15 S.Ct. 4, 39 L.Ed. 52; *Schenck v. State Line Tel. Co.*, 238 N.Y. 308, 144 N.E. 592, 35 A.L.R. 1149, and cases there cited. The election between inconsistent remedies has no reference to transactions giving rise to distinct and independent grounds of action which may be concurrently or consecutively pursued, such as an action for the hire of personal property and one for damages to the property while held by the bailee, or where a choice between substantive rights is involved, as when one by his word or conduct ratifies and makes valid an unauthorized transaction otherwise void, as exemplified in *Robb v. Vos*, *supra*.

To support their contention of choice between substantive rights, appellants contend that they had an election between inconsistent adjective remedies;

that is to say, they could have prayed for a decree quieting their title under the doctrine laid down in *Stuart v. Stephanus*, 94 Fla. 1087, 114 So. 767, or they could have prayed to be dismissed from the foreclosure under the rule announced in *Brown v. Atlanta National Building & Loan Ass'n,* 46 Fla. 492, 35 So. 403; *Hecht v. Wilson*, 107 Fla. 421, 144 So. 886, 145 So. 250. *See, also, Jones v. Florida Lakeland Homes Company*, 95 Fla. 964, 117 So. 228.

We have read *Stuart v. Stephanus*, *supra*, and other cases relied on to support this contention, but we have decided that the decision below must be reversed on another ground, and since we do not have the advantage of adversary argument on this point, we express no opinion in reference to it.

The doctrine of the election of remedies is an application of the doctrine of estoppel on the theory that the one electing should not later be permitted to avail himself of an inconsistent course. If appellants had not in law made a binding election, or if they had not by their acts raised an equitable estoppel against themselves, they should have been permitted to amend under the 1931 Chancery Act.

An election of remedies presupposes a right to elect. It is a choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone. It is generally conceded that to be conclusive it must be efficacious to some extent. A position taken which does not injure the opposite party is not an election which precludes a change or raises an estoppel. The election is matured when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other.

Some courts hold that when an action has been commenced as the result of choosing between two inconsistent remedies the election is made and the estoppel is raised, while others hold that when a choice of remedies has been made it cannot be withdrawn or reconsidered even though no injury has been done, nor would be done by setting it aside. See cases cited in 9 R.C.L. at pages 960 and 961. This rule also applies to a choice of defenses.

The more liberal rule, and the one adopted by most jurisdictions, is in effect that the mere bringing of an action or suit which is dismissed before judgment, where no advantage has been gained or detriment occasioned, no element of estoppel has arisen and no election can be said to have been made. 9 R.C.L. 961; *Register v. Carmichael*, 169 Ala. 588, 53 So. 799, 34 L.R.A. (N.S.) 309; *Cohoon v. Fisher*, 146 Ind. 583, 44 N.E. 664, 45 N.E. 787, 36 L.R.A. 193; *Gridley v. Ross*, 37 Idaho, 693, 217 P. 989; McClure Estate, Inc. v. Fidelity Trust Co., 243 Mass. 408, 137 N.E. 701; *Humiston Keeling & Co. v. Bridgman*, 195 Mich. 82, 161 N.W. 852, 853; *Hartford Life Ins. Co. v. Patterson* (Tex.Civ.App.) 231 S.W. 814; *Kehoe v. Patton*, 21 R.1. 223, 42 A. 868; *McIntosh v. Lynch,* 78 Okl. 85, 188 P. 1079.

In our view the rule last cited is the better one and is approved by this court, but to be effective and raise an estoppel the remedies must be both coexistent and inconsistent. If the remedies are several and consistent, the election of one does not operate to waive the others. Only full satisfaction of the right asserted will raise an estoppel to the pursuit of consistent remedies. The relation of the parties to the right sought to be enforced may determine whether coexistent remedies are inconsistent. *McCormick v. Bodeker*, 119 Fla. 20, 160 So. 483. An attempted exercise of an assumed remedy which turns out to be abortive will not preclude one from resorting to another.

The tendency has been to contract rather than extend the admittedly harsh and sometimes said to be obsolete doctrine of the election of remedies. In the case at bar appellants were defendants below and prayed for the foreclosure of a lien offered as a defense to the main suit. While the suit is yet pending before an issue is made, before any testimony is offered or the position of the parties is in any respect whatever affected they come into court and pray to dismiss their counter suit.

The purpose of the liberal provision for amending pleadings under the 1931 Chancery Act was to arrive at the substantive rights of the parties. In view of this fact and that nothing had been done to change the position of the parties to raise an estoppel, if there was an election, when Williams Brothers prayed to foreclose their tax deeds under the facts in this case they should have been permitted to amend.

If follows that the order appealed from must be, and is hereby, reversed.
Reversed.

ELLIS, P. J., and BUFORD, J., concur.

WHITFIELD, C. J., and BROWN and DAVIS, JJ., concur in the opinion and judgment.

5. Mutually Dependent Promises

HENRY v. ECKER

District Court of Appeal of Florida, Fifth District, 1982

415 So. 2d 137

COWART, Judge.
This case involves specific performance of a contract for the sale and purchase of real property.

Appellees, as sellers, and appellants, as buyers, entered into a written

contract for the sale and purchase of a parcel of land for $70,000, payable $2,000 as a deposit, $28,000 at closing and the balance of $40,000 to be secured by a purchase money mortgage. The contract provided that the transaction would be closed by July 2, 1980, but no provision made time of the essence. The contract made no provision for the buyers taking possession prior to closing, but the buyers took possession under the contract with permission of, or at least without protest from, the sellers. One lawyer undertook to represent both parties, but because he had been notified of a potential claim against the sellers for a real estate commission, the lawyer declined to accept and hold in escrow the buyers' $28,000 and directed the buyers to deposit those funds with another law firm. On July 2, 1980, the parties disputed, with the buyers claiming that the sellers had wrongfully removed an ornamental fireplace mantle contrary to the written agreement, which provided that the sellers had the right to retrieve the mantle, the title to which they retained, only after the buyers remodeled the fireplace. There was also some dispute as to whether one or two lawnmowers were included in the deal. The buyers wanted $2,000 of the purchase money held in escrow pending resolution of these matters, but the sellers would not agree and no closing occurred. Later, the sellers executed a deed and left it in escrow with the attorney and authorized him to close with a $2,000 reduction in the sale price. Nevertheless, when the buyers and the attorney later met (probably July 18, 1980) and attempted to close, the buyers felt that it was the sellers' fault that the transaction had not closed on July 2, 1980, and therefore that interest on the deferred portion of the purchase price should commence from the date of the delayed closing and, further, that the sellers should pay $100 in attorney's fees that the other law firm had charged as a fee relating to the escrow of the buyers' down payment money. Again, no closing occurred. Thereafter, the sellers demanded possession and filed an action for unlawful entry and unlawful detention (detainer). The buyers counterclaimed for specific performance. The trial court denied specific performance on the grounds that the buyers did not have clean hands because the transaction had not closed on July 2 as a result of the buyers' objections and questions about the fireplace mantle and the lawnmowers and the transaction had not closed on the second attempt because of the buyers' position with reference to the commencement date of mortgage payments, interest on the deferred portion of the purchase price and the $100 of attorney's fees.

While the contract was poorly drawn on a poor form, all parties consider it adequate, legal and binding. Both parties, while contentious, basically acted in good faith to close their transaction, but they needed help that they did not have. Performance of the contract by execution of the necessary documents at a closing should have occurred and it still can. The buyers have now been in possession of the property for over a year and a half and there is no way for this controversy to be concluded fairly to both parties except for a court of equity to direct specific performance of the contract with the necessary equitable adjustments.

First, the fact that the two efforts to close this transaction failed does not necessarily mean that either party breached the agreement or was guilty of unclean hands. Failure to close at any one time does not amount to unclean hands; that equitable doctrine was not intended as a penalty to deprive a party of the benefits of a contract merely because they are not agreeable at a closing. Closings of real estate transactions are fraught with potential for disagreements as to details and personality conflicts and emotionally induced positions are common. Equity, like a good real estate closing attorney, should assume that a basically fair and equitable agreement should be performed by the parties and should steadfastly press forward, patiently resolving differences and parrying all personality and other petty matters that threaten attainment of the goal of full good faith performance by all parties.

Time is not of the essence in contracts for the sale and purchase of real estate unless the contract so provides. *See Chabot v. Winter Park Co.*, 34 Fla. 258, 15 So. 756 (1894); *Southern Life Ins. and Trust Co. v. Cole*, 4 Fla. 359 (1852); *Fretwell v. Crisafulli*, 185 So.2d 504 (Fla. 4th DCA 1966). When a contract for the sale and purchase of land does not make time of the essence as it relates to closing, a party can breach that contract only by refusing to perform after demand that a closing take place at a reasonable time and place. In this case, the buyers did not refuse to perform after a demand for performance by refusing to close at a given reasonable time and place. In Florida, ejectment proceedings will not lie against even a defaulting vendee who enters the property under an executory contract for purchase until such time as the vendor gives notice of rescission because of the default and allows the vendee a reasonable time to perform obligations under the contract. *Wismer v. Alyea*, 103 Fla. 1102, 138 So. 763 (1932); *South Florida Farm Co. v. Hall*, 84 Fla. 233, 93 So. 687 (1922).

A contract of purchase and sale, being preliminary to the sale and not the sale itself and also subject to rescission by agreement between the parties, is an executory contract, the two promises of which are mutually dependent and conditional requiring concurrent performance. Since all land is considered unique, money damages to a contract purchaser of lands is an inadequate remedy at law. Therefore, specific performance of contracts for the sale and purchase of real property is generally granted as a matter of right where their terms are fair, certain and definite and they have been entered into without misunderstanding or misrepresentation.

The “clean hands” maxim and the equitable principle for which it stands signify that a litigant may be denied affirmative equitable relief by a court of equity on the ground that his conduct has been inequitable, unfair, dishonest, fraudulent or deceitful as to the controversy in issue. This maxim refers to the acceptability, cleanliness and decency of the claim put forth and describes equity’s practice of refusing an equitable remedy to enforce a claim that is

itself inequitable, unconscionable or tainted by fraud or misrepresentation. Disputes between parties at real estate closings such as in this case do not constitute the kinds of acts or conduct within the basic rationale and purpose of this equitable maxim and the maxim should not be invoked to deny an equitable remedy to one who seeks the enforcement of the legal right to compel a party to a contract to do that which was in the contemplation of the parties as expressed in their contract. Equity ought to require doing that which should have been done. While there is some difference in purpose between the usual executory contract for the sale and purchase of land and the long term contract for deed discussed in *Cain and Bultman, Inc. v. Miss Sam, Inc.*, 409 So.2d 114 (Fla. 5th DCA 1982), viewed as to the interests and legal rights of the vendee, there is little, if any, theoretical difference, especially insofar as the buyer under both types of agreements acquires an interest in the land which is the subject matter of the contract. Buyers under both forms of agreement are equally entitled to specific performance to have a court of equity require the seller to specifically perform the agreement and to convey the legal title to the purchaser as contemplated by the agreement. This legally enforceable contractual right to receive legal title to the land is sometimes called an equitable title. Such an equitable title means the right in equity to acquire the legal title by an action for specific performance. We recognize that, as a practical matter, the equitable title of such a purchaser who is not in actual possession of the land and whose contract rights are not a matter of public record giving constructive notice is ineffectual and unavailing as against a good faith purchaser from the record titleholder. [Footnote omitted] Nevertheless, as between the parties, when no rights of a third party are involved, such equitable title and interest in the land should not be summarily terminated as forfeited, nor should it be adjudicated in a possessory action at law, but should be terminated only by an action in equity, in which action the purchaser, even one who has defaulted, is always judicially given one last fair equitable opportunity to redeem his right in equity to a conveyance of the legal title to the property by payment of all sums due and by himself “doing equity” as may be necessary. In fact, the foundation of the “clean hands” maxim is said to be the same as that of the equitable maxim “he who seeks equity must do equity.” A court of equity has such authority to effectuate this last maxim by specific performance conditioned upon the contract purchaser making the seller whole, that specific performance may be granted in many cases where it would otherwise be denied. In this particular case, equity can best be served by giving the buyer a court sponsored opportunity to pay all principal sums which the buyers should have paid the sellers to date had the original contract been closed on the original date set in the contract for closing (July 2, 1980), and to assume the deferred installment payments at the point presently due under the contract, as originally agreed, with appropriate contract interest thereon. Failing to so redeem, the buyers can be fairly left to face the legal damages which they would otherwise owe the sellers for their long actual possession of the property in question. Accordingly, final judgment below is reversed and the cause remanded with

directions to the court to grant specific performance and to set a short and certain date for the buyers to pay that portion of the original principal sum ($70,000) that would have been paid to that date under the original written contract had the sale evidenced thereby been closed on July 2, 1980, as originally contemplated, but with interest on all such sums not only from July 2, 1980, to their original due date, but also from their original due date to the date of actual payment, all at the rate provided in the contract.

REVERSED AND REMANDED.

DAUKSCH, C. J., and ORFINGER, J., concur.

Notes

60. The “clean hands” doctrine holds that anyone asking a court for a ruling in equity had better have been operating in good faith. In other words, bad actors should not be allowed as a matter of equity to gain advantage due to the other party’s bad acts unless the requesting party has been acting properly and fairly.

61. A “time is of the essence” clause in a contract makes the completion or due date a condition precedent (addressed in Chapter 17). (In an executory contractual situation, it could probably act as a condition subsequent as well). Thus, failure to complete one’s performance on time would prevent the other party’s corresponding duty from arising. In the setting of some contracts, “time is of the essence” rarely applies, and probably never by implication. Examples include longer-term construction projects and purchases of real property. Everyone knows that it is very hard to predict an exact finish date. Should a party to a longer-term executory contract have a firm final date for performance by the other party, this should be clearly stated, because courts are hesitant to sanction the kind of forfeiture that often would follow the finding of failure of condition. And where such clauses exist, courts may agree with the argument that such condition was waived or latch upon some other reason such as failure by both sides to satisfy mutually dependent promises.

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER XX

42. Use of string citations – when to use and when to avoid
43. Mutually dependent and mutually independent promises
44. Promissory estoppel vs. equitable estoppel
45. Election of remedies

46. A sense of the numerous ways that courts (and contractual parties) may avoid forfeiture, especially using rules of construction, interpreting obligations as promises rather than performances, implying-in-law terms (or conditions to stop a party from enforcing one), estoppel, waiver, etc.

SUGGESTED EXERCISE(S)

36. Create a list of mechanisms that courts may use to avoid forfeiture. Without looking at other materials, try to create a short fact situation demonstrating how each of these mechanisms works.

37. Look up “mutually dependent promises” or “mutually dependent covenants” in an annotated resource (e.g., Restatement (Second) Contracts) to find other cases in your jurisdiction, or in other states. Familiarity with resources that provide annotations is an important legal research skill.

CHAPTER 21: RIGHTS & DUTIES OF THIRD PARTIES

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Sometimes contracts between parties will, at a discrete point in time (and this timing drives an important distinction), involve the rights and duties of persons not parties to an agreement.

CMM Approach: At the risk of disturbing the flow, right here is the perfect place to point out an important distinction that will help readers to avoid getting lost in the mire of the law of contracts involving third parties. It is the key distinction for separating this Chapter from the Chapter that follows. *If a contract contemplates the involvement of a third party during formation, either directly or implicitly, one is probably dealing with third-party beneficiary law*. In contrast, *if third parties are brought in some time after formation, either to receive certain rights from a formed contract or to take on some duties from that contract, one is probably dealing with assignment & delegation law.*[52] Cognition of this distinction early on should make things easier. Question: what if a multiple choice question with a murky and complicated set of facts bases its answer not on murky and complicated facts, but on recognition of the difference between third party inclusion in the pre-formation, contrasted with the post-formation, phase of a contract? That is, if the answer was either "third-party beneficiary law," on the one hand, or "assignment, "delegation" or "assignment/delegation" on the other?

At common law, third-party beneficiaries could not enforce rights in contracts to which they were not parties. The parties *could*, of course, modify a contract to add a third party, or novate to remove one party in favor of a new one. However, in the absence of modification or novation, a third party who had some inchoate participation in an agreement was unable to enforce that participation. Several reasons readily explain this old common law rule. First and foremost, there would have been no contractual privity between a

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contractual party and that third party. The idea here is that it would not be fair to permit an outside party to enforce contractual rights to which someone had not specifically agreed. Another reason is that the third party in contemplation would not have added any consideration (addressed in Chapter 5) to the original contract, which technically could run afoul of the third requirement of contract formation.

Over time, courts began to recognize exceptions to the rule that a third-party beneficiary had no enforceable rights in a contract between two (or more, for multi-party contracts) other people. The first likely exception, epitomized by *Lawrence v. Fox*, 20 NY 268 (N.Y. Ct. App. 1859), is where a person to whom a debt is owed (creditor) tells the party who owes that debt (debtor) to pay the amount to a third party (typically, who is owed some money by the original creditor), who would be free of that much debt once the debtor paid it to the third party (who *benefits* from this arrangement – get it?) An example might be helpful:

> X says to Y, "Y, you owe me $500. But 1 owe Z, who lives in the city to which you are traveling tomorrow, $500. 1 will forgive your debt to me of the $500 if you promise to take the $500 and pay it to Z on my behalf, satisfying *my* debt to Z." (See if you can replace "X," "Y," and "Z" using the terms "prior debtor," "prior creditor," "current debtor," "current creditor," and "third-party beneficiary," knowing that there will be some overlap).

Another early exception to the prohibition on third-party contractual rights is well represented by cases such as *Buchanan v. Tilden*, 158 N.Y. 109, 52 N.E. 724, 70 Am St. Rep. 454 (wife), *Todd v. Weber*, 95 N.Y. 181, 47 Am. Rep. 20 (child), *Schemerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec 304 (family support). Suspiciously "equitable" in nature, promises made to another that would benefit that promisor's own wife, child, or family member could be enforced on the basis of the strong moral obligation that such promisor has to do right by his or her family.

A third category of early recognition of a third-party beneficiary right to enforce a contract, now mostly if not totally disavowed, was the ability of a tax-paying citizen to sue a contractor having contracted with a municipal entity. In other words, business owners whose buildings burned despite a private company's agreement with a city to provide water pressure/fire prevention services used to be able to sue the provider based on the notion that it was the group of private citizens, not the municipality, who was the true, intended beneficiary. *See, e.g., Pond v. New Rochelle Water Co.*, 183 Y.Y. 330, 76 N.W. 211, 5 Ann. Cas 504. Can you think of a reason, possibly related to pricing, why this is no longer a popular rule?

A fourth category is where the intent of the parties to a contractual relationship is to primarily benefit a third party as the *raison d'être* for the contract in the first place. The best example of this is probably contracts for life insurance. The policy holder pays premiums, but if any money is paid out it is clearly in favor of named beneficiaries (who have no privity, did not provide any consideration, etc.). Those who would like to read more on the historical development of third-party beneficiary law, from which the four categories just addressed is borrowed, are directed to *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918). Readers may wish to take a moment to contemplate the great debt that contract law owes to the early courts of the State of New York in this area of law. Were it within the thesis of this casebook, this section would probably be dominated by cases from that state's courts. The majority in the *Mendez* case that is set out in full below shares this sentiment.

Pondering what could possibly go wrong with third-party beneficiary contracts, several questions should come to mind. First, is the relationship of contracting parties and the third-party beneficiary the kind that should recognize that third-party's ability to enforce rights in the underlying contract? Are there different categories of third-party beneficiaries, some which quality for protection of their rights and some which may not? Second, are there cases where one of the contracting parties can remove a third-party beneficiary, either choosing to retain the contractual benefit for herself or to direct it to a *different* third-party beneficiary? The idea here is whether there is some kind of *vesting* of third-party beneficiary rights such that they cannot be changed.

The topic of third-party contractual rights is one of the more abstract, and therefore one of the most challenging, areas in contract law. The materials in this Chapter will return to some of the most common challenges after introducing a significant case that should help to explain the "what" question. The opinion that follows involves a highly charged 'political' and strategic issue, i.e., court proceedings vs. arbitration proceedings. This introduces another complicating factor of contract law: politics. Judges, lawyers, and clients span the gamut of philosophical opinion along the liberal to conservative political spectrum. Case law is not unaffected. More often perhaps than one would expect, politics drive decisions. A full understanding of a jurisdiction's law on contracts requires the ability to recognize what rules are common to all of the law, which are subject to debate and therefore to political interpretation, and whether a change in the political make-up of the legislature or of the courts, especially the appellate courts, may signal an upcoming change in how the law is applied. With not a small amount of trepidation, but with an earnest commitment to the blind Madam Justice, the authors will use the case that follows to introduce a political aspect to the mastery of contract law.

1. Elements of Third-Party Beneficiary Contracts

MENDEZ v. HAMPTON COURT NURSING CENTER, LLC

Supreme Court of Florida, 2016
203 So. 3d 146

PERRY, J.

Juan Mendez, Jr. (the "son"), as personal representative of the estate of Juan Mendez, Sr. (the "father"), seeks review of the decision of the Third District Court of Appeal in *Mendez v. Hampton Court Nursing Center, LLC*, 140 So.3d 671 (Fla. 3d DCA 2014), on the ground that it expressly and directly conflicts with decisions of the district courts of appeal on whether a nursing home resident is bound by an arbitration clause in a nursing home contract, when the resident neither signed nor otherwise agreed to the contract. We have jurisdiction. See art. 5, § 3(b)(3), Fla. Const.

This case concerns whether the father is bound by an arbitration clause in a nursing home contract signed by Hampton Court and the son, but not the father. The Third District found "that the father is bound by the arbitration provision contained in the agreement for care executed by his son, and to which the father was the intended third-party beneficiary." *Mendez*, 140 So.3d at 676. We disagree. Accordingly, we quash the Third District's decision and remand for further proceedings consistent with this opinion.

1. Facts and Procedure

Hampton Court Nursing Center ("Hampton Court") admitted the father to its nursing home facility in 2009. At that time, the son signed a nursing home contract with Hampton Court, providing for the father's residency and care at Hampton Court. The contract included an arbitration clause. The father did not sign the contract.

While under Hampton Court's care in 2011, the father developed an eye infection that eventually required the removal of his left eye. In 2012, the son filed suit on the father's behalf in the Circuit Court for the Eleventh Judicial Circuit, Miami–Dade County, alleging negligence and statutory violations. Hampton Court moved to compel arbitration and stay the judicial proceedings. The circuit court heard argument and granted the motion. The father appealed, but passed away while the appeal was pending. *See id.* at 673.

On appeal from the trial court's order, the Third District affirmed. *Id.* at 676. Citing *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So.2d 574 (Fla. 1st DCA 2007), the Third District held that the father was the

intended third-party beneficiary of the nursing home contract, and accordingly, Hampton Court could bind him to its contract even though he never signed it. *Mendez,* 140 So.3d at 674.

2. The Conflict Cases

"Third persons who are not parties to an arbitration agreement generally are not bound by the agreement." 21 Williston on Contracts § 57:19, at 181 (4th ed.2001). Notwithstanding that principle, the district courts disagree on whether a nursing home resident is bound by an arbitration clause in a nursing home contract, when the resident neither signed nor otherwise agreed to the contract.

The First and Third Districts held that the resident is bound by the contract, because the resident is the intended third-party beneficiary of the contract. *See Mendez*, 140 So.3d at 674; *Alterra Healthcare*, 953 So.2d at 579. Both courts emphasized that the resident is bound irrespective of whether the resident signed the contract, or whether the signing party had authority to act on the resident's behalf. *See Mendez*, 140 So.3d at 674; *Alterra Healthcare*, 953 So.2d at 579. As discussed below, we reject this view.

On similar facts, the Second, Fourth, and Fifth Districts held differently. *See Perry ex rel. Perry v. Sovereign Healthcare Metro W., LLC*, 100 So.3d 146, 147–48 (Fla. 5th DCA 2012); *Fletcher v. Huntington Place Ltd. P'ship*, 952 So.2d 1225, 1227 (Fla. 5th DCA 2007); *Lepisto v. Senior Lifestyle Newport Ltd. P'ship*, 78 So.3d 89, 92 (Fla. 4th DCA 2012); *In re Estate of McKibbin*, 977 So.2d 612, 613 (Fla. 2d DCA 2008). These decisions analyzed the facts using an agency law framework and held that a resident was not bound by a contract that he or she did not sign, where the signing party did not agree to the contract on the resident's behalf or lacked the authority to act for the resident. *See Perry*, 100 So.3d at 147–48*; Fletcher*, 952 So.2d at 1227; *Lepisto*, 78 So.3d at 92; *McKibbin*, 977 So.2d at 613. The Fifth District explicitly considered and rejected the type of third-party beneficiary argument upheld in *Mendez* and *Alterra He*althcare. *See Perry*, 100 So.3d at 147–48.

3. The Third–Party Beneficiary Doctrine

Hampton Court urges us to adopt the rule of *Mendez* and *Alterra Healthcare*: that under the third-party beneficiary doctrine, a nursing home resident may be bound by a contract to which the resident never agrees. We disagree.

The doctrine of third-party beneficiaries provides that under certain circumstances, a person may sue to enforce a contract, even though the person is not a party to the contract. *See* 11 Fla. Jur.2d Contracts § 206, at 406–07 (2008). "To establish an action for breach of a third party beneficiary contract, [the third-party beneficiary] must allege and prove the following four

elements: ‘(1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach.’ ” *Found. Health v. Westside EKG Assocs.*, 944 So.2d 188, 194–95 (Fla.2006) (*quoting Networkip, LLC v. Spread Enters., Inc.*, 922 So.2d 355, 358 (Fla. 3d DCA 2006)); *see also* Patrick John McGinley, 21 Fla. Prac., Elements of an Action § 603:1 (2015–2016 ed.).

[*Authors’ Note: Comparing this to the requirements for establishing breach in Chapter 8, noteworthy is the fact that the requirements are the same, with the additional component of third-party involvement.*]

Critically, the third-party beneficiary doctrine enables a non-contracting party to enforce a contract against a contracting party—not the other way around. *See, e.g., Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1380 (Fla.1993); *Shingleton v. Bussey*, 223 So.2d 713, 715 (Fla.1969). The third-party beneficiary doctrine does not permit two parties to bind a third—without the third party's agreement—merely by conferring a benefit on the third party. *Mendez* and *Alterra Healthcare* are not in accord with this principle.

We have previously held that “[w]e see no reason to allow [the non-contracting third-party beneficiary] to enjoy the benefits of the [contract] without bearing its burdens as well.” *Nat'l Gypsum Co. v. Travelers Indem. Co.*, 417 So.2d 254, 256 (Fla.1982) (holding that the non-contracting third-party beneficiary had to comply with the contract's pre-litigation notice requirements if the third party wanted to sue to enforce the contract). We distinguish National Gypsum, however, because the third-party beneficiary in that case sued to enforce a contract between other parties; here, the father's estate sued for negligence and statutory violations—not to enforce the son's contract with Hampton Court.

This distinction is consistent with many of the authorities cited in Justice Polston's dissenting opinion. For instance, the dissent observes that “Florida courts have required third-party beneficiaries to arbitrate,” Polston, J., dissenting op. at 154 (*quoting Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295, 1302 (11th Cir.2014)); that “[o]rdinarily, a third party beneficiary is bound by an arbitration clause in the contract under which the party claims third party beneficiary status,” Polston, J., dissenting op. at 154 (*quoting* 8 Fla. Prac., Constr. Law Manual § 7:38 (2015–2016 ed.)); and that “traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through ... third-party beneficiary theories,' ” Polston, J., dissenting op. at 154 (*quoting Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (emphasis removed)). We agree that when a plaintiff sues under a contract to which the plaintiff is not a party—unlike the father in this case—we will ordinarily enforce an arbitration clause

contained in that contract, absent some other valid defense. *Cf. Nat'l Gypsum*, 417 So.2d at 256. However, the rule of *National Gypsum*, does not apply here because the father does not bring suit as a third-party beneficiary for the benefit of a contract signed by others. The circumstances presented in *National Gypsum* are not presented here. Neither Justice Polston's dissenting opinion, *Mendez,* nor *Alterra Healthcare* makes this distinction, and none finds support from *National Gypsum*.

Mendez and *Alterra Healthcare* also run contrary to the purpose behind the third-party beneficiary doctrine, which is to do justice for the non-contracting third-party beneficiary. From the early days of the third-party beneficiary principle, its proponents recognized that the third-party beneficiary rule was grounded in principles of justice and equity. *See, e.g.*, Arthur L. Corbin, Law of Third Party Beneficiaries in Pennsylvania, 77 U. Penn. L.Rev. 1, 6 (1928); Samuel Williston, Contracts for the Benefit of a Third Person, 15 Harv. L.Rev. 767, 772–73 (1902). The seminal case establishing the third-party beneficiary doctrine argued that "manifest justice" required the establishment of the third-party beneficiary doctrine, even if traditional contract principles demanded a different result. *Lawrence v. Fox*, 20 N.Y. 268, 275 (1859) (plurality opinion).

Justice Polston's dissent disapproves of these authorities, criticizing them as old. *See* Polston, J., dissenting op. at 152–53, 154. Lawrence is now "universally recognized as the landmark case in the evolution of the contract law of third party beneficiaries in the United States." 9 Corbin on Contracts § 42.3, at 16 (rev. ed.2007). Professor Williston's writings are instructive "because almost immediately after *Lawrence v. Fox* was decided, contract law became dominated by the doctrinal reasoning of the classical contract school, as exemplified ... in the commentaries of figures like ... Williston." Melvin A. Eisenberg, Third–Party Beneficiaries, 92 Colum. L.Rev. 1358, 1365 (1992). Professor Corbin's thoughts are especially noteworthy because he "had more influence on the sustained development of [the third-party beneficiary] rule than anyone else before him or since." Anthony Jon Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule, 98 Harv. L.Rev. 1109, 1172 (1985). If *Lawrence* and Professors Corbin's and Williston's writings are invalid merely because of their age, then so is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

Neither *Mendez* nor *Alterra Healthcare* squares with the principles of justice and equity underlying the third-party beneficiary doctrine: both decisions permit contracting parties to bind the non-contracting party without the non-contracting party's consent. *See Mendez*, 140 So.3d at 674–76; *Alterra Healthcare*, 953 So.2d at 579. We would never enforce an admission agreement if a nursing home obtained a resident's signature by threatening the violent destruction of the resident's property unless the resident signed the agreement. *Cf. Casto v. Casto*, 508 So.2d 330, 335 (Fla.1987) (invalidating

a prenuptial agreement in part because of the husband's ultimatum that the wife “sign the agreement or he would blow up the house and throw Clorox all over her clothes”). If we will not enforce a contract when a party agrees under threat or duress, then we should not enforce a contract in the absence of the party's agreement altogether.

4. Agency Law and Medical Incapacity

Justice Polston's dissent also attempts to distinguish this case on other grounds, claiming that the son signed the admissions contract as a representative of his father. Polston, J., dissenting op. at 154. The record in this case does not support this analysis.

First, we cannot conclude that the son was the father's representative. When “the totality of the evidence is susceptible to multiple inferences and interpretations, the existence and scope of an agency relationship are generally questions of fact.” *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 853 (Fla.2003); *see also Goldschmidt v. Holman*, 571 So.2d 422, 424 (Fla.1990) (“[T]he existence of an agency relationship is normally one for the trier of fact to determine, [except where] there [is] no evidentiary question ... for the [factfinder] to resolve.” (citation omitted)). In this case, the record contains conflicting evidence on the question of agency. On one hand, the nursing home contract contains the son's signature on a line labeled “Resident's Representative.” On the other hand, the record also contains the son's affidavit attesting to the fact that the father had not granted the son any written authorization to act as the father's agent, nor had the father “otherwise directed, appointed, or instructed [the son] in any way on or prior to [the date of the father's admission to Hampton Court] to carry out [the father's] affairs for him relating to any matter.” We need not remand to the trial court to hold an evidentiary hearing and determine whether the son was the father's representative, however, because Hampton Court expressly disclaims any reliance on agency principles. See Hampton Court's Answer Br. 5 (stating that “an argument ... based on principles of Agency Law [sic] ... has no relevance in cases like this one”); *id.* at 14 (noting that Hampton Court has “made no argument based on agency law principles”); Oral Arg. at 33:39 (Q: “So are you saying [that the son was] the father's agent?” A: “No, Your Honor. No.”).

Finally, we hold that the father's mental capacity does not impact the outcome of this case. Hampton Court explicitly concedes that a nursing home resident's “mental capacity or competence is irrelevant to the question of whether an individual can be bound to the terms of a contract as a third party beneficiary.” Hampton Court's Answer Br. 13–14; *id.* at 18 (observing that a nursing home resident's “capacity to give informed consent or make medical decisions ... is irrelevant in a third party beneficiary analysis”); *id.* at 30 (“[The father's] mental status is irrelevant to a proper third party beneficiary

analysis.”). If Hampton Court were concerned that the father lacked the required mental capacity to execute binding contracts, it could have availed itself of the Legislature's comprehensive statutory scheme governing incapacitated individuals. *See* Florida Guardianship Law, ch. 744, Fla. Stat. (2015). Any adult person—presumably including an individual affiliated with Hampton Court—could have petitioned for a court to adjudicate the father incapacitated and appoint a guardian. See §§ 744.3201, 744.334, Fla. Stat. An appointed guardian would have held the power to contract on the father's behalf for his residency at Hampton Court. See § 744.441(21), Fla. Stat. Hampton Court elected not to seek appointment of a guardian, and we decline to use common law contract principles to conduct an end-run around the Legislature's comprehensive guardianship scheme.

5. Conclusion

We hold that the third-party beneficiary doctrine does not bind the father to the arbitration agreement in Hampton Court's nursing home admission agreement, to which he never agreed. Accordingly, we quash the Third District's decision below, and remand to that court for further proceedings not inconsistent with this opinion. We approve the decisions in Perry, Lepisto, McKibbin, and Fletcher, to the extent those decisions are consistent with this opinion.

It is so ordered.
LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY, J., dissents with an opinion.

POLSTON, J., dissents with an opinion.

CANADY, J., dissenting.

1 am sympathetic to the view that the third-party beneficiary doctrine should not be employed to impose the arbitration provisions of the nursing home contract at issue in this case on the estate of Juan Mendez, Sr., who was not a party to the contract. The application of that doctrine is highly problematic in this case where there is no suggestion that Mendez exercised his will to obtain the benefit of any provision of the contract or otherwise manifested his assent to the contract. But the view adopted by the majority concerning the scope of the third-party beneficiary doctrine as the ground for quashing the district court's decision is not based on any argument presented by the Petitioner. Because 1 conclude that the Petitioner has made no argument that justifies quashing the decision on review, 1 dissent.

Our law recognizes the "sanctity" of the right "to freely contract [.]" *State Farm Fire & Cas. Co. v. Marshall*, 554 So.2d 504, 505 (Fla.1989). Accordingly, contracts to which competent parties have given their assent are declared invalid only if there is a compelling justification for doing so. *See, e.g., Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999) ("Florida courts may properly decline to enforce a contract on the ground that it is unconscionable. To support a determination of unconscionability, however, the court must find that the contract is both procedurally unconscionable and substantively unconscionable." (citation omitted)). The obverse of the right to freely contract is the right not to be bound by a contract without assent. Contract law—including the law governing contracts to arbitrate—is about protecting and enforcing the expression of the will of the contracting parties. Just as courts should not invalidate the expressed will of contracting parties without compelling justification, courts should not impose contractual obligations on a nonparty without compelling justification.

The Petitioner here presents no argument explaining why the third-party beneficiary doctrine is by its own terms inapplicable in this case. Instead, the Petitioner relies on the effect of section 400.151, Florida Statutes (2009), which sets forth requirements for nursing home contracts. The Petitioner argues that where a nursing home contract has not been executed in accordance with the requirements of section 400.151 any remedy under the third-party beneficiary doctrine is foreclosed. According to the Petitioner, the common law third-party beneficiary doctrine is wholly displaced by the statute.

This argument would preclude a remedy in circumstances where the third-party beneficiary doctrine could quite appropriately be applied—e.g., where the nonparty intended beneficiary nursing home resident had affirmatively sought to enforce a provision of the contract. Accepting the logic of the argument regarding the displacement of the common law would also entail displacing remedies based on contract implied in the law or contract implied in fact in circumstances where affording such remedies would be appropriate under existing law. The Legislature could, of course, displace the third-party beneficiary doctrine and the law regarding contracts implied in law and in fact, but nothing in the regulatory requirements of section 400.151 suggests that the failure to observe the formalities required by the statute should result in the wholesale displacement of common law remedies. The statute does not expressly displace existing common law remedies, and to displace those remedies by implication in this context is manifestly unreasonable.

The Petitioner's reliance on section 400.151 is unpersuasive. And no ground has been presented to justify quashing the decision on review.

POLSTON, J., dissenting.

Instead of applying well-settled contract law regarding third-party beneficiaries, the majority creates a manifest injustice “standard” by turning reasoning from old law review articles and a plurality opinion from an 1800s New York case on its head. The majority's decision will allow courts to arbitrarily disavow arbitration clauses as occurs here by Hampton Court being denied arbitration with Juan Mendez, Jr., the very person who signed the contract at issue.

1.

The Third District Court of Appeal explained the facts and procedural history of the case as follows:

> On March 13, 2009, the father was admitted to the facility. On the day the father was admitted, a doctor employed by the facility determined the father lacked the capacity to give informed consent or make medical decisions. The admission forms included an agreement for care (“the agreement”). The agreement is the contract under which the facility provided the father with the various residential, nursing, and other services associated with residency at a nursing home facility.
>
> The agreement contained a broad arbitration clause, as follows:
>
> > Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be settled by arbitration in accordance with the provisions of the Florida Arbitration Code found at Chapter 682, Florida Statutes, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
>
> Although the son was not acting under a power of attorney at that time, he signed the agreement on a signature line indicating “signature of resident's representative.” Below that signature block, the agreement included the following language:
>
> > In the event that the resident has appointed a representative to control his/her assets, and even if such appointment has not been made through a legal document, the resident's representative shall be fully bound to the extent of those assets to the terms of this Agreement.
>
> The father resided at the facility for approximately four years, from early 2009 until his death in late 2013. His residency included years before and after the incident giving rise to this

> lawsuit. In July 2011, while residing at the facility, the father's eye became infected and had to be removed. The father subsequently gave the son power of attorney. In December 2012, the son brought suit against the facility on behalf of the father. The facility moved to compel arbitration on the basis of the arbitration clause in the agreement. The son asserted that the arbitration clause was not binding on the father, who was not a party to the agreement. The trial court compelled arbitration
> and this appeal [affirms].

Mendez v. Hampton Court Nursing Ctr., LLC, 140 So.3d 671, 673 (Fla. 3d DCA 2014).

2.

The majority obliterates longstanding Florida contract law applicable to third-party beneficiaries and denies Hampton Court's right to arbitrate, even though arbitration provisions are favored. *Jackson v. Shakespeare Found., Inc.*, 108 So.3d 587, 593 (Fla.2013) ("Courts generally favor [arbitration] provisions, and will try to resolve an ambiguity in an arbitration provision in favor of arbitration.").

The law is well settled that the rights of third-party beneficiaries are limited by the terms of the contract. *See* 2 Williston on Contracts § 364A, at 873–74 & n. 5 (3d ed.1959) (collecting cases holding that a third-party beneficiary's right is limited by the terms of the contract). Our district courts in Florida have long held this includes contractual arbitration provisions. 8 Florida Construction Law Manual § 7:38 (2015–2016 ed.) ("Ordinarily, a third party beneficiary is bound by an arbitration clause in the contract under which the party claims third party beneficiary status."). "Florida courts have required third-party beneficiaries to arbitrate*." Kong v. Allied Prof'l Ins. Co.,* 750 F.3d 1295, 1302 (11th Cir.2014). " '[T]raditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.' " *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (*quoting* 21 Williston on Contracts § 57.19, at 183 (4th ed.2001)) (emphasis added).

To hold that arbitration is not required, the majority arbitrarily applies a manifest justice "standard," relying on law review articles from 1902 and 1928, and dicta from an 1859 New York plurality opinion. Majority op. at 150; *Lawrence v. Fox*, 20 N.Y. 268, 275 (1859) (stating that manifest justice might result in a different outcome from the case before it). Essentially, the majority asserts that, because the third-party beneficiary doctrine was originally based upon principles of equity, the doctrine should yield when a court believes that

enforcing an arbitration clause would be manifestly unjust. The majority attempts to persuade the reader of the propriety of turning the "manifestly just" language from the 1800s plurality on its head by quoting a 2007 edition of Corbin on Contracts and fairly recent law review articles regarding Professors Williston and Corbin. However, the majority ignores the fact that the two treatises that currently bear the names of Professors Williston and Corbin do not support the majority's position. *See* 21 Williston on Contracts § 57:19, at 183 (4th ed. 2001) ("[N]onsignatories may be bound by arbitration agreements entered into by others where they have no greater rights than those of the party through whom they claim, applying traditional principles of agency and contract law, including assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel."); 9–46 Corbin on Contracts § 46.9 (2015) ("Absent a contract term to the contrary, the beneficiary will be subject to an arbitration clause in the contract for two reasons: (1) such holdings conform to the general principle that the terms of the contract define and limit the rights of the third party beneficiary; (2) there is a strong public policy in favor of arbitration."). The majority's position is simply out of step with binding legal doctrine.

Using its manifest injustice "standard," the majority reasons that Juan Mendez, Jr., should not be required to arbitrate his father's claims because his father did not sign the nursing home contract that included the arbitration clause. But Juan Mendez, Jr., signed the admissions contract on the line labeled "Resident's Representative." Now, the son seeks to disavow the terms of the contract that he signed as a representative of his father, while currently acting as a representative of his father's estate. It is not manifestly unjust to enforce the terms of a contract against the same person who signed it.[1]

Additionally, the majority attempts to distinguish the claim at issue in this case from a claim raised by a third-party beneficiary. The majority agrees that "when a plaintiff sues under a contract to which the plaintiff is not a party ... we will ordinarily enforce an arbitration clause contained in that contract." Majority op. at 149. But the majority claims that here "the father does not bring suit as a third-party beneficiary for the benefit of a contract signed by others." *Id.* This is nonsensical. Perhaps the majority's claim is related to its assertion that "the father's estate sued for negligence and statutory violations —not to enforce the son's contract with Hampton Court." *Id.* at 149. However, Hampton Court's duty to provide care to the father only arose based upon the contract signed by the son for the benefit of the father. Therefore, perhaps the majority is intending to hold that the enforcement of the contract would be manifestly unjust because the claim is outside the scope of the arbitration clause? This apparent mixture of different legal theories is incomprehensible and certainly not the law.

Further, the majority incorrectly states that the district courts disagree on whether a nursing home resident is bound by an arbitration clause in a

nursing home contract when the resident did not sign or otherwise agree to the contract. Majority op. at 148. To the contrary, the district courts have all applied well-settled third-party beneficiary law and held that those residents are bound by the arbitration clauses.

The majority acknowledges that the First and Third Districts have held that those residents are bound as a third-party beneficiary. Majority op. at 148. Indeed, the Third District has explained that "[a]rbitration clauses in contracts are binding on third party beneficiaries." *Orion Ins. Co. v. Magnetic Imaging Sys. 1*, 696 So.2d 475, 478 (Fla. 3d DCA 1997) (*citing Terminix Int'l Co., LP v. Ponzio*, 693 So.2d 104, 109 (Fla. 5th DCA 1997) ("As third party beneficiaries, these additional plaintiffs are bound by the arbitration provision.")); *see also Zac Smith & Co., Inc. v. Moonspinner Condo. Ass'n, Inc.*, 472 So.2d 1324, 1324 (Fla. 1st DCA 1985) (holding that "an arbitration clause in a contract is binding on a third-party beneficiary"). This is true even if the third-party beneficiary did not sign the contract containing the arbitration agreement: "[A] nonsignatory to an arbitration agreement may be bound to arbitrate if the nonsignatory has received something more than an incidental or consequential benefit of the contract, or if the nonsignatory is specifically the intended third-party beneficiary of the contract." *Germann v. Age Inst. of Fla., Inc.*, 912 So.2d 590, 592 (Fla. 2d DCA 2005).

But the majority incorrectly states that the Second, Fourth, and Fifth Districts hold otherwise. Majority op. at 148 (stating that "[t]he First and Third Districts held that the resident is bound by the contract, because the resident is the intended third-party beneficiary of the contract" but that "[t]he Second, Fourth, and Fifth Districts held differently").

The Second, Fourth, and Fifth Districts all acknowledge that third-party beneficiaries can be bound by arbitration provisions. *See Terminix*, 693 So.2d at 109 (*citing Raffa Assocs. v. Boca Raton Resort & Club*, 616 So.2d 1096 (Fla. 4th DCA 1993); *Zac Smith*, 472 So.2d 1324). For example, the Fifth District has explained that "Florida courts have generally held that arbitration clauses in contracts may be enforced by and are binding on third party beneficiaries." *Hirshenson v. Spaccio*, 800 So.2d 670, 673 (Fla. 5th DCA 2001) (citing cases); *see also Lion Gables Realty Ltd. v. Randall Mech., Inc.*, 65 So.3d 1098, 1099 (Fla. 5th DCA 2011). The Fourth District also recognizes that "ordinarily a third-party beneficiary of a contract is bound by an arbitration clause in that contract." *Raffa Assocs.*, 616 So.2d at 1097; *see also Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So.2d 1089, 1090 (Fla. 4th DCA 2001) ("[A] third party beneficiary to a contract can be compelled to arbitrate."). Further, the Second District recently held, in *Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Ass'n, Inc.*, 118 So.3d 957, 958 (Fla. 2d DCA 2013), that third-party beneficiaries can be compelled to arbitrate. In a parenthetical, the Second District explained that, "[a]s a basic derivative of the principle that a third-party beneficiary steps into the shoes of a

contracting party and is subject to all provisions of [the] contract, a third-party beneficiary of a contract containing an arbitration provision can be compelled to arbitrate." *Id*. (*quoting* J. Douglas Uloth & J. Hamilton Rial, 3, Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?, 21 Rev. Litig. 593, 602 (Summer 2002)).

The majority cites the Fifth District's decision in *Perry ex rel. Perry v. Sovereign Healthcare of Metro West, LLC*, 100 So.3d 146 (Fla. 5th DCA 2012), as the basis for its claim that the Fifth District has disavowed general third-party beneficiary doctrine in regard to nursing home contracts, but the holding in *Perry*, 100 So.3d at 147–48, was based upon the fact that the person who signed the contract in that case only signed as a guarantor for payment on behalf of the resident, not as the resident's representative or the resident's power of attorney. This difference is legally significant. *See Fed. Deposit Ins. Corp. v. Univ. Anclote, Inc.*, 764 F.2d 804, 806 (11th Cir.1985) ("A guaranty is a collateral promise to answer for the debt or obligation of another." (*citing Nicolaysen v. Flato*, 204 So.2d 547, 549 (Fla. 4th DCA 1967))).

Lepisto v. Senior Lifestyle Newport Limited Partnership, 78 So.3d 89, 92 (Fla. 4th DCA 2012), and *Fletcher v. Huntington Place Limited Partnership*, 952 So.2d 1225, 1227 (Fla. 5th DCA 2007), cited by the majority, are likewise distinguished on the basis that the contract indicated that the signor was a financial guarantor, not a representative for the resident. Finally, the majority cites *In re Estate of McKibbin*, 977 So.2d 612 (Fla. 2d DCA 2008), but that decision does not mention third-party beneficiaries at all. The Second District does explain that "there was no evidence that [the resident] was mentally or physically incapacitated to make decisions for herself," which is factually different from the case before us. Id. at 613.

3.

In conclusion, 1 would follow well-settled contract law regarding third-party beneficiaries and not create a manifest injustice standard that allows the court to disavow arbitration proceedings on an ad hoc basis. 1 would not deny Hampton Court the right to arbitrate with Juan Mendez, Jr., the same person who signed the contract as the representative for his father.
1 dissent.

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[1] The majority once again misses the point in its discussion of agency law and medical incapacity. See majority op. at 151. Third-party beneficiary contract law, not agency law, controls this case.

Notes

(52) One of the authors had the good fortune of clerking for a state's Court of Appeals and its Supreme Court. The hallmarks of a bitter political divide, no matter how carefully veiled, shine through with phrases such as "[i]f *Lawrence* and Professors Corbin's and Williston's writings are invalid merely because of their age, then so is *Marbury v. Madison* [ ]." Sometimes, the gloves come off.

(53) Which party in the *Mendez* case would most likely stand to benefit from arbitration proceedings? Which would be more likely to benefit if the case went to court rather than to arbitration? Which groups or industries championed arbitration as a way to avoid court proceedings, and why? Is the bitter divide between those who favor arbitration, and those who do not, now more clear? Do these positions not align somewhat readily into political philosophies? Even "red" vs. "blue"? Are there constituencies to please and are potential campaign donations at stake? (Or perhaps a balancing of keeping insurance companies from leaving the state to avoid bankruptcy on the one hand, and liberally approving sometimes attenuated claims to insurance on the other? Is it better to keep insurance companies around, or facilitate their bankruptcy/decision to leave the state when payouts grow beyond what the market will bear?) Ordinarily, issues of politics in the law are left to U.S. Constitutional Law courses. This too is part of counsel's job.

(54) The majority in the *Mendez* case noted that third-party beneficiary law allows non-contracting parties to enforce a contract where their connection to that contract is a close one, but that it has never been extended to the situation where a contracting party tries to use it against a non-contracting party. The idea here is that a person possessed his own tort claim, which arguably could be pursuable in a venue to which he or she never assented, should have the choice rather than allow third parties to "contract away" this person's (and state courts') rights. That the person's child signed a contract with an arbitration clause might bind the child if he sued, but not the father. The *Mendez* case raises some very interesting legal and political questions. Nevertheless, esoteric issues should not obscure the fact that the primary thing to take away from the *Mendez* case is its elements necessary to create rights in a third-party beneficiary.

2. The Intent Requirement for Third-Party Beneficiary Rights

SECURITY MUTUAL CASUALTY CO. v. PACURA

District Court of Appeal of Florida, Third District, 1981
402 So. 2d 1226

PER CURIAM.

The appellant, Security Mutual Casualty Company, seeks review of a final summary judgment for the plaintiff, awarding her damages under the medical expense coverage of an automobile insurance policy issued by the appellant to one Charles Calvin Whiddon.

On January 3, 1975, Janice Pacura was a passenger in her own automobile, which was being driven by Charles Whiddon. The automobile, which was not covered by any kind of insurance, was involved in an accident in which plaintiff Pacura (owner of the automobile) was injured, resulting in medical bills in excess of $6,000.00. Whiddon (the driver) was the son of the named insured of an automobile policy issued by the defendant (appellant herein), Security Mutual Casualty Company. At the time of the accident, Whiddon was a resident of the same household as the named insured of the Security policy. As a result of the accident, Pacura sued Security for uninsured motorist benefits and medical expense benefits. The trial court dismissed the uninsured motorist benefits claim with prejudice and granted Security a summary judgment on the medical expense benefits claim but, on rehearing, reversed itself and denied Security's motion for summary judgment. Pacura's subsequent motion for a summary judgment on her medical expense benefits claim was granted, with a summary judgment for such benefits entered in her behalf. This appeal by Security followed.

In the instant case we are considering a claim by an alleged third party beneficiary of an insurance contract. The right of a third party beneficiary to sue under a contract is recognized in Florida, but that right is limited to those situations where the provisions of the contract clearly show an intention primarily and directly to benefit the individual bringing suit or to a class of persons to which he claims to belong as a third party beneficiary. *Wright v. Terry*, 23 Fla. 160, 2 So. 6 (1887); *McCann Plumbing Co. v. Plumbing Industry Program*, 105 So.2d 26 (Fla. 3d DCA 1958); *Bryant v. Cole*, 282 So.2d 652 (Fla. 2d DCA 1973); *Mulligan v. Wallace*, 349 So.2d 745 (Fla. 3d DCA 1977).

Florida has also recognized the right of a third party beneficiary to bring an action directly against an insurer to recover under contractual provisions of medical payment coverages. *Maxwell v. Southern American Fire Insurance*

Company, 235 So.2d 768 (Fla. 3d DCA 1970). However, in so holding, the court did not address itself to the question of whether or not the individual was in fact a third party beneficiary under the contract as that fact appeared without question. In the case sub judice, that is exactly the question at hand. The insurer claims the plaintiff was not covered by the policy, whereas the plaintiff is claiming that the policy is ambiguous and therefore she should be considered a third party beneficiary and thus insured under the medical payment coverage.[1]

As previously stated, in order to be considered a third party beneficiary to a contract, the parties to the contract must clearly intend its benefits extend to the third party. This does not appear from those portions of the policy quoted in footnote (1); in fact, the policy clearly eliminates any coverage to the plaintiff as she owned the uninsured automobile involved in the accident. Nowhere has this principle been receded from. To permit her to claim as a third party beneficiary status based on an allegation that the contract is not clear would be contrary to the established law and should not be permitted.[2] *See: Johnson v. United States Fire Insurance Company*, 586 F.2d 1291 (8th Cir. 1978). Therefore, the final summary judgment appealed herein is hereby reversed and the cause is remanded to the trial court with directions to enter a judgment for the appellant insurance company.

Reversed and remanded, with directions.

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[1] "MEDICAL EXPENSE COVERAGE
"The company will pay all reasonable medical expense incurred within one year from the date of accident for bodily injury caused by accident and sustained by
....
(2) any other person while occupying
....
(b) a non-owned automobile, if the bodily injury results from
(i) its operation or occupancy by the named insured, or
(ii) its operation or occupancy by a relative, provided it is a private passenger automobile or utility trailer, but only if such operator or occupant has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission;
....
"PERSONS INSURED
"Under the Medical Expense Coverage, the following are insureds:
....
(b) with respect to a non-owned automobile,
....
(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b) (1) or (2) above." (emphases added)

[2] We note that the Second District Court of Appeal, in *Nicks v. Hartford Insurance Group*, 291 So.2d 673 (Fla. 2d DCA 1974) did, in fact, determine a coverage question brought by a stranger to an insurance contract, who was claiming coverage based upon a claimed

ambiguity. It did not, however, address the question of the right of the plaintiff to bring the action initially.

3. Changes to Third-Party Rights Before Vesting

Once a third-party beneficiary's rights have vested, changes are not possible without the third party's consent. The *Palm Lake Partners 2, LLC* case sets out when such rights vest. It is important to note that Sections 8 and 9 of the following excerpted opinion are not specifically necessary to understand third-party beneficiary law, but other sections are. (In fact, maybe the most important paragraphs are the second and third paragraphs of Section 5 of the opinion). Nevertheless, at some point everyone needs to know about the *exhaustion of remedies* doctrine and to understand the basics of municipal regulation and its place in the legal system. Attention is directed particularly to the first sentence in the second paragraph of Section 5 in the excerpt below, as well as the second sentence of the fifth paragraph, for the "black letter law." Also particularly worthy of note is the *Palm Lake Partners, LLC* court's reliance on a provision in the Restatement (Contracts) Second for the rule on vesting.

PALM LAKE PARTNERS 2, LLC v. C & C POWERLINE, INC.

District Court of Appeal of Florida, First District, 2010

38 So. 3d 844

BENTON, J.

Palm Lake Partners, 2, LLC (Palm Lake) and Falcon Lake Apartments, LLC (Falcon Lake) appeal the judgment entered against them in an action C and C Powerline, Inc. (C & C) brought claiming (as a purported third-party beneficiary) breach of Palm Lake's contract to purchase real property (Purchase Agreement) from Peter Del Col, John Marchi, and Roy Simpson (Sellers).

* * *

Sellers owned a 55–acre parcel in Jacksonville that Palm Lake Drive bisects, as well as a strip of property abutting the 55–acre parcel to the north. C & C operates a business on 30 acres still farther north, and relies on Palm Lake Drive for access to its own property. When C & C's owner, Chuck Chitty, learned a comprehensive plan amendment—to change the land use designation of Sellers' parcel from industrial to residential—was under consideration, he spoke to Sellers' representative, Barry Hurtz. Mr. Chitty was

concerned that new residents might complain about truck traffic. Eventually, Messrs. Chitty and Hurtz verbally agreed that C & C would not, in exchange for construction of an alternate access road to C & C's property, object to any comprehensive plan amendment reclassifying Sellers' property as residential.

On May 1, 2005, Sellers and Palm Lake signed the Purchase Agreement, which (wholly unbeknownst to C & C at the time) provided: "The parties acknowledge that it will be necessary to build an access road from a city street north of the property across adjacent property that the Seller owns to Main Street ('Access Road'). The purpose of the Access Road is to provide alternative ingress and egress to adjacent property owners to the north of the Property. The Access Road will be constructed by Buyer pursuant to the terms and conditions as set forth in Paragraph 11 herein." Paragraph 11 of the agreement provided, in part:

> Access Road: The parties acknowledge that it is necessary to construct an Access Road at the northern boundary of the site to provide alternate access for property owners located north of the Property. Buyer agrees to construct the Access Road pursuant to plans and specifications approved by the parties.... Seller shall pay for one half the cost of the Access Road but no more than Three Hundred Fifty Thousand Dollars ($350,000.00). Seller's portion of the cost of the Access Road shall be deducted from Purchase Price. Buyer shall pay for the balance of the cost of the Access Road. In the event the Final Bids exceed[ ] $900,000, Buyer has the right to terminate this Agreement and receive a return of its deposit. Buyer agrees to bond off and commence construction of the Access Road prior to occupancy of any units on the Property.

Anticipating construction of apartments on the parcel, an application was filed with the City of Jacksonville (City) for a Planned Unit Development (PUD), and, on August 23, 2005, the City enacted Ordinance 2005–740–E, which rezoned the parcel as a PUD, "subject to the written description dated August 11, 2005."[Footnote omitted] The rezoning was also explicitly subject to the following condition: "The development shall proceed in accordance with the Traffic Engineering Memorandum dated August 4, 2005 and attached hereto as Exhibit 4, or as otherwise approved by the Traffic Engineering Division and the Planning and Development Department." [Footnote omitted] As it had promised, C & C did not object to the rezoning that Ordinance 2005–740–E effected.

On February 28, 2006, before access road plans and specifications—much less construction permits or any contract—had been approved, Sellers conveyed the parcel to Palm Lake on the terms set out in the Purchase Agreement as amended by a written grant of easement for a future access road (the easement and road construction agreement), which provided: "Grantee agrees

as partial consideration for the grant of this easement by Grantor to bond off and commence construction of the Future Access Road no later than February 28, 2009 and prior to occupancy of any units on the Grantee's Parcel. If Grantee fails to commence construction by February 28, 2009, Grantee shall pay to Grantor Three Hundred Fifty Thousand and no/100 Dollars ($350,000.00) and shall be released from the obligation to construct the Future Access Road." [Footnote omitted]

2.

Only after closing did the developers (Palm Lake and Falcon Lake) obtain engineering plans for the access road and FDOT approve a connection to Main Street. Soon thereafter, however, it became apparent that a portion of the access road was proposed to run along a section of Noah Road [Footnote omitted] on ground that guy wires steadying Jacksonville Electric Authority (JEA) power lines already occupied. JEA advised all concerned that relocating the guy wires would cost some $800,000, and would take a long time to engineer, and that guy wires might soon be unnecessary altogether because of changes JEA contemplated making in the power grid system.

In February of 2007, the developers discussed with a city councilman the PUD condition requiring construction of an access road as an alternative to Palm Lake Drive. After a later meeting between the developers and certain City officials, the City officials construed the PUD condition as not only not requiring the developers to construct the access road but as not permitting them to do so, either, and a memorandum was placed in the Palm Lake PUD file to the effect that construction of the access road would violate Ordinance 2005–740–E. Palm Lake and Falcon Lake subsequently informed the Sellers and C & C—which learned only in February of 2007 that Sellers had sold the parcel—that the access road would not be constructed.

3.

Apprised of the situation, C & C filed the complaint that began the proceedings below, asserting doubt as to its rights under the ordinance and requesting declaratory judgment. C & C also alleged that it was a third-party beneficiary of the Purchase Agreement between Sellers and Palm Lake, and that Palm Lake had breached the agreement. C & C sought temporary and permanent injunctive relief, including a ban on leasing residential units until an access road was constructed. [Footnote omitted]

Sellers, who had initially intervened as parties plaintiff, filed cross-claims against Palm Lake, Falcon Lake and the City, after C & C named them as defendants in an amended complaint. Sellers also sought a declaration of their rights under the ordinance as to the City; and under the Purchase Agreement (as modified by the easement and road construction agreement) regarding

Palm Lake's and Falcon Lake's asserted duty either to build the access road or to return $350,000 to Sellers and to relinquish the easement Sellers had conveyed for construction of an access road.

Eventually, the trial court granted partial summary judgment, ruling that C & C was a third-party beneficiary of the Purchase Agreement's access road provisions. In a supplemental order, the trial court set out its rationale: that, by not opposing the rezoning, C & C had materially changed its position in justifiable reliance on Sellers' promise to construct an access road and that C & C's justifiable reliance precluded any purported modification of the Purchase Agreement that would permit the access road to go unbuilt. On this basis, [Footnote omitted] the trial court concluded that the subsequent easement and road construction agreement was ineffective because Sellers and Palm Lake had entered into it without C & C's consent. In its final judgment, the trial court ruled that damages would not afford C & C an adequate remedy for the failure to build an access road (providing an alternative to Palm Lake Drive), and that the equitable remedy of specific performance was appropriate.

* * *

v.

The trial court erred in concluding that the Purchase Agreement, which provided that it "may be amended ... by written instrument executed by both parties," created an immutable obligation on Palm Lake's part to construct an access road for the benefit of C & C. Sellers promised C & C an alternative access road without specifying who would finance or build the road, and without indicating that anyone other than Sellers themselves would be responsible for construction of the road. A "promisor and a promisee can by agreement create a duty to a beneficiary which cannot be varied without his consent. But in the absence of such an agreement the parties retain control over the contractual relation they have created." RESTATEMENT (SECOND) OF CONTRACTS § 311 cmt. f. (1981).

The power of the promisor and promisee to discharge or modify the duty owed to a third-party beneficiary by subsequent agreement terminates only "when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee." Id. at § 311(3). In the present case, until February of 2007, C & C was not even aware that Sellers and Palm Lake had entered into the Purchase Agreement.

Inasmuch as the rezoning was fully accomplished on August 23, 2005, C & C did not rely on the Purchase Agreement when it refrained from contesting the

rezoning of Sellers' parcel. *See Joseph Bucheck Constr. Corp. v. W.E. Music*, 420 So.2d 410, 414 n. 4 (Fla. 1st DCA 1982) (“Assuming that Bucheck was an intended beneficiary of the joint venture agreement, Saco and Music would have been free to rescind, vary, or abrogate the agreement as they saw fit, without the assent of third party beneficiary, Bucheck, unless Bucheck had accepted, adopted or acted upon it.”); 13 Richard A. Lord, Williston on Contracts § 37:57 at 337, 340 (4th ed. 2000) (“A discharge or variation was therefore considered ineffective after the beneficiary's acceptance, or detrimental action in reliance upon the promise” and the present view is that “an intended beneficiary's rights do not vest until the third party has either accepted the agreement or detrimentally relied upon it.”). When C & C decided not to oppose either the amendment to the comprehensive plan or the subsequent rezoning, C & C apparently relied on nothing more than verbal assurances from Sellers that they would see to it that another access road was built. [Footnote omitted]

The Purchase Agreement contemplated several contingencies and provided that, if rezoning approval and FDOT permits for the access road were not received by May 1, 2006, the agreement would automatically terminate and the option payment would be returned to Palm Lake; and that Palm Lake could elect to terminate the Purchase Agreement if Sellers refused or were unable to cure any title or survey defects or if the City imposed conditions on the PUD which would cause Palm Lake additional costs in excess of $150,000. Any reliance on the Purchase Agreement before the sale closed as conferring an inalienable right to an access road would not have been justifiable.

The Purchase Agreement provided that Palm Lake need not construct an access road in the event final bids exceeded $900,000, and provided that in the event the final bids for construction of the access road exceeded $900,000, Palm Lake had the right to terminate the agreement and to receive a return of its deposit. Neither permits for the access road [Footnote omitted] nor final bids for construction of the access road have ever been obtained.

Before the sale closed, the Purchase Agreement did not bind any party to construct an access road. Sellers and Palm Lake remained free to repudiate, alter, amend or supersede the Purchase Agreement's access road provisions in whole or in part, and did so as part of the closing. C & C's rights were and could be no greater than Sellers' rights. *See Crabtree v. Aetna Cas. & Sur. Co.*, 438 So.2d 102, 105 (Fla. 1st DCA 1983) (“A third party beneficiary's right of action on the promise cannot, however, rise higher than the rights of the contracting party through whom he claims.”). On this record, there was no justifiable, detrimental reliance by C & C, as a matter of fact and law. For this reason, we reverse the judgment in favor of C & C against Palm Lake and Falcon Lake.

6.

The trial court also entered judgment in favor of Sellers against Palm Lake and Falcon Lake. Unlike C & C, which was a stranger to the Purchase Agreement, Sellers negotiated directly with Palm Lake and were entitled to the benefit of the agreement they reached with Palm Lake. But, as expressly contemplated by the Purchase Agreement, Sellers and Palm Lake altered the terms of their initial agreement originally set out in the Purchase Agreement, when they executed the easement and road construction agreement at closing.

Relying on paragraph 11 of the Purchase Agreement, the trial court found Sellers were entitled to construction of an access road with infrastructure for electrical, but not for other, utilities. In awarding Sellers the remedy of specific performance, rather than awarding damages, the trial court stated merely that it would be appropriate to grant to Sellers the same remedy it had granted to C & C. But the trial court erred, *inter alia*, [Footnote omitted] in failing to recognize that the easement and road construction agreement modified and superseded paragraph 11 of the Purchase Agreement.

The Purchase Agreement called for Palm Lake to build an access road as a condition of purchasing the 55–acre parcel, and contemplated Palm Lake's expending up to $550,000 ($900,000 minus $350,000) on the project. By the time of closing, however, Palm Lake and the Sellers had made another arrangement, one evidently sufficiently more favorable to Palm Lake to induce Palm Lake to close, and had reduced their revised agreement to writing. Among the terms of their new arrangement, [Footnote omitted] was this crucial provision in the easement and road construction agreement: “If Grantee fails to commence construction by February 28, 2009, Grantee shall pay to Grantor Three Hundred Fifty Thousand and no/100 Dollars ($350,000.00) and shall be released from the obligation to construct the Future Access Road.”

7.

Because construction did not commence by February 28, 2009, the easement and road construction agreement required that Palm Lake pay Sellers $350,000 in order to be released from the obligation to build an alternative access road. At oral argument, Palm Lake asserted it had tendered the money and remained ready, willing and able to pay the whole amount. However that may be, [Footnote omitted] the parties' revised agreement contains what is essentially a liquidated damages clause [Footnote omitted] rather than an open-ended obligation to build a road of the kind the trial court ordered be constructed as specific performance. The trial court's decision, to grant Sellers specific performance on their cross-claim, rather than damages (on the sole stated ground that “the Court has already determined that [C & C] is entitled to” specific performance), was error.

8.

The trial court denied Sellers' cross-claim seeking a declaration of the rights and duties of the parties under Ordinance 2005–740–E, on grounds these questions should first be addressed to the City. Pursuant to section 656.109 of the City's Ordinance Code, the Planning and Development Department has the responsibility to "enforce and interpret the Zoning Code, including ordinances related to Planned Unit Development districts." Any person who is, or stands to be, an adversely affected person as a result of the implementation of any provision of the Zoning Code may request a written interpretation of any zoning ordinance. § 656.109, Jacksonville Ordinance Code (2007). If dissatisfied with the Director's interpretation, the adversely affected person may appeal the decision to the City Planning Commission pursuant to sections 656.109(b) and 656.135 of the Ordinance Code.

Before seeking declaratory relief in court, these administrative remedies should have been pursued. "It is now well settled that where adequate administrative remedies are available, it is improper to seek relief in the circuit court before those remedies are exhausted." *Cmtys. Fin. Corp. v. Fla. Dep't. of Envtl. Reg.*, 416 So.2d 813, 816 (Fla. 1st DCA 1982). "The doctrine of exhaustion of remedies counsels against judicial intervention in the decision-making function of the executive branch in certain circumstances.... When an agency has discretion to exercise, it should of course be allowed to make discretionary decisions. If a party succeeds in vindicating its rights in the administrative process, thus obviating the need for judicial intervention, judicial resources are conserved; and immediate judicial access can weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Santana v. Henry*, 12 So.3d 843, 846 (Fla. 1st DCA 2009).

The doctrine of exhaustion of remedies applies to municipal governmental agencies no less than it applies to state administrative agencies subject to the Administrative Procedure Act. *See Browne v. City of Miami*, 948 So.2d 792, 793–94 (Fla. 3d DCA 2006); *City of DeLand v. Lowe*, 544 So.2d 1165, 1168 (Fla. 5th DCA 1989). Indeed, the requirement to exhaust administrative remedies when a municipal agency has jurisdiction over a question antedates enactment of the modern Administrative Procedure Act. *See De Carlo v. Town of W. Miami*, 49 So.2d 596, 596 (Fla.1950).

By its terms, Ordinance 2005–740–E is to be interpreted as subject to both the written description dated August 11, 2005, and the apparently conflicting Traffic Engineering Memorandum dated August 4, 2005. Ordinance 2005–740–E provides further that development will proceed "as otherwise approved by the Traffic Engineering Division and the Planning and Development Department." The trial court wisely refrained from diving into these murky municipal waters when it denied the request for a declaratory judgment for

failure to exhaust administrative remedies, which are readily available to Sellers and may very well give Sellers authoritative answers to the road construction questions (or any others) they may have.

9.

Accordingly, we reverse the judgment entered against Palm Lake and Falcon Lake and in favor of C & C outright. We also reverse the judgment entered against Palm Lake and Falcon Lake and in favor of Sellers, but remand with directions to enter judgment against Palm Lake and Falcon Lake and in favor of Sellers in the amount of three hundred fifty thousand dollars ($350,000.00), together with legal interest from March 1, 2009.13 On the cross-appeal, we affirm.

VAN NORTWICK and CLARK, JJ., concur.

Problem 21-1

Developer promised to pay a portion of subdivision home sales receipts, which amount was being added to an escrow account, to a new school district if it is established within five years of the completion of the subdivision, or else to the existing nearby school district if a new one was not established. Prior to completion of the subdivision, Developer and the existing homeowners in the subdivision agreed to liquidate the escrow account and use the funds for a new clubhouse with swimming pool. (All future contracts, as well as all plans, for sales within the subdivision were amended to remove the school district funding requirement). The existing school district filed a suit seeking the monies in the escrow account. What result, and why? *See Board of Education of Community School District No. 220 v. Village of Hoffman Estates*, 126 Ill. App. 3d 625, 467 N.E.2d 1064 (App. Ct. Ill. 1984).

4. Special Cases: Statutory Control Over Vesting of Third-Party Rights

The Florida Legislature has created an interesting rule regarding vesting of third-party beneficiary rights concerning accident insurance. Accident insurance policies, like life insurance policies, are the quintessential example of the *Ransom v. Seaver* fourth category of third-party rights: contracts that have as their primary intent the benefit to third parties. It is interesting to see that the Florida law postpones the recognition of rights to accident insurance proceeds, i.e., it directs the timing of when such rights *vest*. Can you think of the reason why?

VanBIBBER v. HARTFORD ACC. & INDEM. INS. CO.

Supreme Court of Florida, 1983
439 So. 2d 880

McDONALD, Justice.

VanBibber appealed the trial court's dismissal of an insurance company as a party defendant. The first district certified the appeal as passing on a question of great public importance or as having a great effect on the administration of justice throughout the state. We have jurisdiction pursuant to article 5, section 3(b)(5) of the state constitution.

The issue in this case is the constitutionality of section 627.7262, Florida Statutes (Supp.1982). A second issue, if the statute is found constitutional, is whether the statute is applicable to causes of action accruing prior to the effective date of the statute. We hold that the statute is constitutional, but that it has no application to a cause of action predicated on events which occurred prior to the effective date of the statute.

VanBibber, claiming an injury, sued Publix Super Markets and its insurance carrier, Hartford, for a claimed tort that occurred on June 25, 1982. Relying on section 627.7262, the trial judge dismissed Hartford from the case, [Footnote omitted] holding the statute both constitutional and applicable to the instant case. On appeal the district court certified the cause to this Court as requiring immediate resolution.

Section 627.7262 reads as follows:

> Nonjoinder of insurers.—
>
> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (2) No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, prior to first obtaining a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (3) Insurers are affirmatively granted the substantive right to insert in liability insurance policies contractual provisions that

> preclude persons who are not designated as insureds in such policies from bringing suit against such insurers prior to first obtaining a judgment against one who is an insured under such policy for a cause of action which is covered by such policy. The contractual provisions authorized in this subsection shall be fully enforceable.
>
> (Footnote omitted.)

It is readily apparent that, by enacting this statute, the legislature sought to modify the third-party beneficiary concept adopted by this Court in *Shingleton v. Bussey*, 223 So.2d 713 (Fla.1969), to provide that an injured party has no beneficial interest in a liability policy until that person has first obtained a judgment against an insured. The statute transfers the accrual of a beneficial interest from the date of occurrence until the time an action brought on a tort has matured to a judgment. The statute is quite clear that no cause of action against an insurance company shall accrue until a judgment against an insured is obtained. Moreover, the statute authorizes insurance companies to insert nonjoinder provisions in their insurance policies. The significance of this last provision is found in the language of *Shingleton* where this Court said:

> This requirement of the procedural rules raises the presumption that unless the Legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert “no joinder” clauses in liability policies there is no basis in law for insurers to assume they have such contractual right as a special privilege not granted other citizens to contract immunity with their insureds from being sued as joint defendants by strangers.

Id. at 718–19.

In *Markert v. Johnston*, 367 So.2d 1003 (Fla.1978), we considered section 627.7262, Florida Statutes (1977), which prohibited the joinder of a motor vehicle liability insurer in an action to determine the insured's liability. We found the statute to be procedural and held it unconstitutional for invading this Court's exclusive rulemaking authority. Thus, if the successor statute under consideration is likewise procedural, and not substantive, it would have to fail on the grounds enunciated in *Markert*.

We perceive substantial differences between the two statutes. The present statute requires, as a condition precedent to having a third-party interest in an insurance policy, the vesting of that interest by judgment; the prior statute did not. The present statute specifically authorizes a contractual provision

prohibiting direct third-party suits; the prior one did not. [Footnote omitted] Because of the differences between the statutes, *Markert* does not control.

The regulation and supervision of insurance is a field in which the legislature has historically been deeply involved. See chs. 624–632, Fla.Stat. While this Court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement. In *Shingleton* we found that public policy authorized an action against an insurance company by a third-party beneficiary prior to judgment. The legislature has now determined otherwise. Our public policy reason for allowing the simultaneous joinder of liability carrier espoused in *Shingleton*, therefore, can no longer prevail. Finding that the statute is substantive and that it operates in an area of legitimate legislative concern precludes our finding it unconstitutional. If a statute can be construed to be constitutional it should be. *Falco v. State*, 407 So.2d 203 (Fla.1981). We hold that section 627.7262, Florida Statutes (Supp.1982), is constitutional.

Until the enactment of this statute our pronouncements in *Shingleton* and *Markert* authorized, simultaneously, a suit in tort against a tortfeasor and a claim against that tortfeasor's insurance company. The legislature did not make this statute retroactive so we need not concern ourselves with whether this was permissible. We have held today that the statute is substantive. In the absence of clear legislative intent to make them retroactive, substantive statutes are prospective only. *Seddon v. Harpster*, 403 So.2d 409 (Fla.1981). Because the incident in this cause occurred prior to the effective date of section 627.7262, October 1, 1982, *Shingleton* and *Markert* control this suit.

The order of the trial judge is affirmed to the extent of holding the statute constitutional, but is reversed in holding it applicable to the present suit. The cause is remanded for further proceedings consistent herewith.
It is so ordered.

ALDERMAN, C.J., and OVERTON and EHRLICH, JJ., concur.

SHAW, J., concurs in part and dissents in part with an opinion, in which ADKINS, J., concurs. [Opinion omitted].

BOYD, J., dissents with an opinion. [Opinion omitted]

5. Unintended Third Parties: Incidental & Consequential Beneficiaries

In the case below, there is again a very serious political issue at stake. The third through the sixth paragraphs of the *Metropolitan Life Ins. Co.* case concern a tort issue: intentional infliction of emotional distress. As was indicated in Section 3 of this Chapter in the introduction to the *Palm Lake Partners 2* case, several paragraphs in the following opinion are not specifically necessary to what is being conveyed for purposes of contract law. However, paragraphs three through six below, addressing a potential intentional tort, establish a foundation for better understanding what is happening. In the case that follows, the original plaintiff argued two bases for recovery: (1) the insurance company committed an intentional tort (not so important); and (2) a limitation on third-party beneficiary coverage could not apply to plaintiff's wife so as to deny her coverage under his policy (critically important to this Chapter). It was never the intention of the authors to seek out cases with complicated, interconnected political questions. Nevertheless, third-party beneficiary rights are something of an abstract concept. This may explain why there is much argumentation in the alternative, not to mention the political wrangling of the higher courts as they wrestle with policy. Liberal construction of coverage provisions in insurance policies is matched against more conservative constructions. It is interesting to note that the more liberal view carried the majority of the Florida Supreme Court in the *Mendez* case, whereas the more conservative faction(s) won the day in the case that follows. Resort to legislative history may often indicate the public policy(ies) behind a state statute.

METROPOLITAN LIFE INS. CO. v. McCARSON

Supreme Court of Florida, 1985
467 So. 2d 277

EHRLICH, Justice.

This cause is before us because the decision of the district court in *Metropolitan Life Insurance Co. v. McCarson*, 429 So.2d 1287 (Fla. 4th DCA 1983), directly and expressly conflicts with a decision of another district court, *Gmuer v. Garner*, 426 So.2d 972 (Fla. 2d DCA 1982). We have jurisdiction, article 5, section 3(b)(3), Florida Constitution, and we approve in part and quash in part the decision of the Fourth District.

McCarson was issued a group insurance policy by Metropolitan Life which covered employees of his paint and body shop including his wife. The next year, Mrs. McCarson became incapacitated with Alzheimer's disease. Metropolitan stopped payment of benefits for her, claiming that the condition had been preexisting and that the failure to disclose it voided her coverage. McCarson brought suit; Metropolitan was found to be in breach of contract and ordered to provide coverage pursuant to the contract. Later it became necessary for Mrs. McCarson to have round-the-clock nursing, for which

Metropolitan was liable under the terms of its contract until the policy lapsed or Mrs. McCarson became eligible for Medicare. After requesting proof of ineligibility for Medicare, and receiving no response, Metropolitan eventually discontinued payments and the round-the-clock nursing ceased. McCarson brought suit to enforce the policy provisions, but in the meantime, Mrs. McCarson was removed from her home and placed in a total care nursing facility where her condition deteriorated remarkably. A few months later she died of a heart attack. Medical testimony indicated that the stress of her new surroundings probably brought about her demise. McCarson amended his original complaint and, as Lucille's personal representative, added a count for wrongful death on the theory that Metropolitan's failure to fulfill the terms of the contract had been a willfull infliction of emotional distress upon Mrs. McCarson which had thereby caused her death. A jury awarded McCarson medical costs, $200,000 for the emotional distress suffered by Mrs. McCarson, and $250,000 for her wrongful death. The trial court struck the award for Mrs. McCarson's emotional distress but upheld the remainder of the award. Metropolitan appealed but the Fourth District Court of Appeal affirmed the award, finding a cause of action for intentional infliction of emotional distress sufficient to support the cause of action for wrongful death.

We approve the Fourth District's decision insofar as it states that Florida recognizes the tort of intentional infliction of emotional distress. We have skirted that issue in previous cases, finding it not to be directly before the Court. *See e.g., LaPorte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla.1964); *Slocum v. Food Fair Stores*, 100 So.2d 396 (Fla.1958); *Kirksey v. Jernigan*, 45 So.2d 188 (Fla.1950). The thorough discussion and analysis of the Fourth District below shows that four of the five district courts of appeal have recognized that tort. *Dominguez v. Equitable Life Assurance Society*, 438 So.2d 58 (Fla. 3d DCA 1983); *Scheuer v. Willie*, 385 So.2d 1076 (Fla. 4th DCA 1980); *Food Fair, Inc. v. Anderson*, 382 So.2d 150 (Fla. 5th DCA 1980); *Ford Motor Credit Co. v. Sheehan*, 373 So.2d 956 (Fla. 1st DCA), *cert. dismissed*, 379 So.2d 204 (Fla.1979). Only the Second District has failed to recognize the availability of an independent cause of action for intentional infliction of emotional distress. *Gmeur v. Garner*. We are in agreement with the majority and so disapprove the decision in *Gmeur*.

The Fourth District joined with the First and Fifth in adopting Section 46, Restatement (Second) of Torts (1965) as the appropriate definition of the tort. Nonetheless, the Fourth District did not conform its findings to the comments explaining the application of this definition:

> d. Extreme and outrageous conduct ..... It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation which would entitle the plaintiff to punitive

> damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> ....
>
> g. The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

Restatement (Second) of Torts § 46 (1965). In light of the verdict in McCarson's favor, we must assume all disputes of fact were resolved and all reasonable inferences were drawn in his favor. Nonetheless, looking at the facts in the light most favorable to him, the facts as a matter of law are not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." Rather, the insurance company according to the terms of the policy had the right to demand proof of ineligibility for Medicare. Although this demand and the withholding of further benefits had tragic results, and although we must assume from the jury's verdict that it found Metropolitan was in reckless disregard of the potential for such tragedy, Metropolitan did no more than assert legal rights in a legally permissible way. As such, Metropolitan's actions are "privileged under the circumstances."

We therefore quash the decision of the district court insofar as it holds that Lucille McCarson had a cause of action for intentional infliction of emotional distress sufficient to support Mr. McCarson's suit for wrongful death.

Because the district court found the wrongful death action to be supported by the cause of action for intentional infliction of emotional distress, it did not address the counts alleging breach of contract or bad faith dealing. In the interests of judicial economy, we will do so now.

We are well aware that, prior to this Court's decision in *VanBibber v. Hartford Accident & Indemnity Insurance Co.*, 439 So.2d 880 (Fla.1983), injured parties entitled to benefits were considered intended third-party beneficiaries to liability insurance policies and, as such, were entitled to enforce the policy directly against the insurer. This analysis was justified by the adversarial relationship between the insured and the injured party and the insurance company's status as the real party in interest from whom the injured party would be collecting for his damages once liability was proven. *See e.g.,*

Shingleton v. Bussey, 223 So.2d 713 (Fla.1969). Liability insurance provides indemnity against liability. In the usual liability policy, the insuror is bound to pay damages for bodily injury or property damage for which any covered person becomes legally liable, up to the applicable policy limits, because of an accident and such damages are directly payable to the injured party. To that extent, the insurer contracts to bear the insured's financial responsibility to the intended third-party beneficiary.

However, this analysis is not applicable to the policy here before us, which provides indemnity against loss. The insurance contract into which Mr. McCarson entered promised to indemnify him for any covered medical expenses he incurred on behalf of his covered dependents, including Lucille. The insurer did not relieve him of any financial responsibility for the payment of medical expenses incurred. No benefits were ever payable directly to her. Neither were her interests adverse to the insured's; on the contrary, they both were adversely aligned against the insurance company. Thus, because she reaped no direct benefit, and because the insured was in a position to protect her interests, she was at best an incidental third-party beneficiary of the contract. It is axiomatic in contract law that an incidental beneficiary cannot enforce the contract. See J. Calmari & J. Perillo, Contracts §§ 17-2, 17-6 (2d ed. 1977). Therefore, Lucille McCarson would not have been able to maintain a cause of action either for breach of contract or for bad faith dealing on the contract. Florida's Wrongful Death Act, in section 768.19, Florida Statutes (1981), requires, as a condition precedent to bringing the action for wrongful death, that the decedent have a cause of action on which she could have brought suit had she survived. Such is not the case here on the facts pleaded. Mr. McCarson's wrongful death claim must be disallowed.

Accordingly, the decision of the district court is approved in part and quashed in part and the case is remanded to the trial court for entry of judgment not inconsistent with this opinion.

It is so ordered.

OVERTON, ALDERMAN and McDONALD, JJ., concur.

BOYD, C.J., and SHAW, J., concur in part and dissent in part with opinions.

BOYD, Chief Justice, concurring in part and dissenting in part.

1 concur in the Court's disapproval of the district court's affirmance of the recovery for wrongful death by reckless or intentional infliction of emotional distress. 1 base my conclusion not only on the lack of wilful, wanton, or outrageous conduct on the part of the insurer, but also on the lack of a prima facie showing by evidence that the insurer's conduct caused the death of Mrs. McCarson.

The fact that the deceased's condition deteriorated badly after she was placed in a nursing home does not establish that the denial of benefits caused the deterioration and subsequent death. There was insufficient evidence to raise a proper jury question on the matter of causation. Another way of expressing this is to say that it was not foreseeable that a death would ensue from the denial of benefits. As the majority concludes, the insurer was entitled to strict compliance with the policy requirements, and cannot be held responsible in tort for an occurrence only very tenuously connected with its taking a step it was legally entitled to take.

On the matter of whether Mrs. McCarson was a direct beneficiary of the group health insurance policy, 1 totally disagree with the majority's conclusion and agree with the statements of Justice Shaw. The deceased was clearly a direct beneficiary of the policy, and not a third-party beneficiary. Under my view of this case, the answer to this question makes no difference to the outcome because there was no way the insurer's conduct could have in fact caused the death of Mrs. McCarson.

SHAW, Justice, concurring in part and dissenting in part.1 agree that Florida recognizes the tort of intentional infliction of emotional distress. Having disposed of the point of law which establishes our conflict jurisdiction, 1 would approve the district court decision in its entirety. 1 recognize that the question of whether petitioner's conduct rose to the level of extreme and outrageous conduct is a difficult and close decision. However, a jury, a trial judge, and a district court believed it did. 1 would not substitute this Court's judgment for theirs. *Glass v. Parrish*, 51 So.2d 717, 721 (Fla.1951).

1 also disagree with the majority's holding that Lucille McCarson was, at best, an incidental third-party beneficiary of the health plan contract and could not have maintained a cause of action either for breach of contract or for bad faith dealing by the insurance company.

Lucille McCarson was originally covered under the group health plan as an employee. After she left employment, and before the suit, she became covered as a dependent spouse. The critical issue is whether Lucille McCarson was an intended or incidental beneficiary under the health-plan contract. Restatement (Second) of Contracts (1979) provides:

§ 302. Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

As 1 read section 302, Lucille McCarson meets the test in both subsections (1) (a) and (b). Under Florida law spouses are reciprocally responsible to each other for necessities, including medical bills. *Parkway General Hospital, Inc. v. Stern*, 400 So.2d 166 (Fla. 3d DCA 1981); *Manatee Convalescent Center, Inc. v. McDonald*, 392 So.2d 1356 (Fla. 2d DCA 1980); chapter 61, Florida Statutes (1971). Thus, Ernest McCarson was responsible for the medical bills of his spouse, Lucille. The health plan was a method of meeting that responsibility. In contracting to provide medical coverage for Lucille (beneficiary), both the promisee (Ernest) and the promisor (Metropolitan Life) intended to give the beneficiary the benefit of the promised performance. It appears to me that Lucille could reasonably have relied on the contractual promise as manifesting an intent to confer a right on her, within policy limits, and that she might well have foregone obtaining other medical insurance to meet her needs. It is this aspect of the majority decision that 1 find particularly disturbing from a public policy viewpoint. The majority opinion holds that covered dependents under medical insurance policies are only incidental beneficiaries and have no right to enforce the performance of the policy. 1 suspect this will come as a surprise and disappointment to millions of medical insurance policy holders.

Problem 21-2

While they were shopping for law books in a bookstore, Uncle was so happy with Niece’s decision to attend law school that he promised her a full set of state law reporters for her new office once she graduated. (Note: since we are well past the early contract issues of formation and consideration, you may presume that Niece readily and properly accepted the offer, backed by her promise to finish law school). Bookseller heard this and assured Uncle and Niece that he would be around and very pleased to make the sale when the time was right. Four years later, Niece graduated but went to work with a human rights organization in a foreign land, where she did not need law books. If he brought suit to enforce Uncle’s promise, would disgruntled Bookseller recover? Why or why not?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 21

62. The elements required to qualify as a third-party beneficiary
63. Vesting of third-party beneficiary rights and the ability to change things on a third-party beneficiary
64. Arbitration proceedings vs. court proceedings to resolve contractual conflicts, and why the use of one or the other is often a very hotly contested issue (which indicates certain advantages and disadvantages, depending on perspective)
65. Florida Supreme Court jurisdiction over splits of authority between district courts of appeal
66. Escrow accounts
67. Doctrine of exhaustion of remedies

SUGGESTED EXERCISE(S)

47. On the internet, look up the biographies of your state court's Supreme Court Justices. Glean their respective, primary political affiliations from their education, work experiences, memberships, endorsements, etc. (Along with the occasional purples and greens, there will be a marked predominance of "reds" and "blues"). Take several cases from a recent publication and parse the majority opinion, dissents, concurrences, etc., to discern any patterns. Compare this information to your assessment from the *Mendez* case.

CHAPTER 22: ASSIGNMENT & DELEGATION

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Generally, parties to a contract may freely assign their rights to third parties, and it is also possible to delegate one's duties under a contract to a third party. The difference in transferability boils down to the nature of the thing to be transferred. If the transfer would work no hardship on the non-transferring, contractual party, there is no problem. However, a transfer sometimes raises the burden, or increases the risk, on the non-transferring, contractual party, and this is where the law steps in to prevent a transfer. The difference is that whereas the transfer of a right more often has no negative effect, such as sending payment to a new party rather than the original contracting party, the delegation of a duty often involves personal services or expectations for performance that are unique or special to the recipient. As an example, a contractual party may allow you to authorize a third party to cut your lawn, but would not allow you to direct someone else to do your legal work, or to paint your portrait. Similarly but more rarely, even an assignment of rights can increase the burden or decrease the risk. For example, someone could assign their right to a shipment of oranges, but if shipment to the assignee is to a far-away state, it would increase the costs (extra shipping costs) and possibly even the risk (risk of spoilage for which the shipper may be responsible). For a highly comprehensive primer on assignment of contractual rights, *see, e.g.,* Practical Law Practice Note, Assignability of Commercial

Contracts (FL), THOMSON REUTERS, http://www.westlaw.com (last visited Apr. 10, 2018) (login and search required).

CMM Approach: The law on third party beneficiaries can be quite complicated, and it may be better to disregard the fact that every delegation is a third-party beneficiary situation. Most important at this point is to quickly distinguish between an assignment/delegation scenario in contrast to a third-party beneficiary one.[53] Where either a right owed to another or a duty owed to another is to be transferred to a third party as part of an *already-formed contract*, it is the subject of assignment and delegation law.

In fact, Florida has codified these rules in the case of sales of goods in FLA. STAT. § 672.210 (2017):

> Delegation of performance; assignment of rights:
>
> (1) A party may perform her or his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having her or his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> (2) Except as otherwise provided in s. 679.4061, unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on her or him by her or his contract, or impair materially her or his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of her or his entire obligation can be assigned despite agreement otherwise.
>
> * * *
>
> (4) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.
>
> (5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a

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> delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by her or him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

The main things to learn from this Chapter are how *assignments* operate, how *delegations* operate, how they interrelate, and the concept of a *novation*. Going against the trend of using shorter cases to demonstrate important concepts, this Chapter includes the *Sans Souci* case to introduce an important area of law that is secondary to an understanding of contact law but deserves attention: administrative law and its relation to ordinary court procedures. (Also not redacted is material on contract *interpretation* as a refresher of the materials in Chapter 14). The *Pope* case in the material on *delegation* considers the interconnectedness of contract and tort law in cases involving negligence/medical malpractice. This area too is one where public policy balancing harm to citizens on the one hand, and the continued viability of medical and insurance services offered in the State of Florida on the other, has led to significant legislative involvement.

1. Assignments

A Definition & Basic Workings

PRICE v. RLI INS. CO.

District Court of Appeal of Florida, Fifth District, 2005

914 So. 2d 1010

SHARP, W., J.

Melanie and Joseph Price appeal from a final summary judgment, which determined they could not recover under a surety bond issued in favor of First Choice Auto Finance, Inc. The Prices sought to recover damages associated with the wrongful repossession of their vehicle, which they purchased and financed at First Choice. The trial court concluded the Prices were not proper claimants under the bond because their contract had been assigned by First Choice to another company, Florida Finance Group, Inc., and that company had repossessed the vehicle for non-payment under the contract. We agree with the trial court and affirm.

The operative facts in this case are not in dispute. In March 1998, the Prices purchased a used 1992 Chevrolet Lumina from First Choice, a licensed motor vehicle dealer. First Choice financed the purchase and entered into an installment sales contract with the Prices. Under the contract, the Prices

borrowed $6,242.49 and were required to make 48 monthly payments of $218.48 beginning April 1, 1998. The contract provided that it could be assigned and First Choice assigned the contract to Florida Finance.

In November 2001, the Lumina was repossessed. In January 2002, the Prices' attorney sent a written demand for its return to Florida Finance. However, the vehicle was not returned.

Melanie then filed suit against both First Choice and Florida Finance for wrongful repossession of the vehicle and other claims. Neither defendant responded to the complaint. [Footnote omitted] In August 2002, a final judgment and entry of default was entered against the defendants for $17,413.09.

The Prices then filed suit against RLI, as surety for First Choice. RLI had issued a surety bond for $25,000 covering First Choice, as principal, pursuant to section 320.27(10). [Footnote omitted] The bond provides that RLI shall be bound in favor of any person who suffers a loss as the result of the failure of First Choice to "comply with the conditions of any written contract made by such dealer in connection with the sale or exchange of any motor vehicle ..."

RLI answered the Prices' complaint and asserted several affirmative defenses, including that it had no liability because the vehicle had not been repossessed by First Choice. RLI also moved for summary judgment arguing that it had no liability because its bond covered only First Choice and the vehicle had been repossessed by Florida Finance. Following a hearing, summary judgment was granted in its favor and this appeal ensued.

On appeal, the Prices first argue there was insufficient evidence for the trial court to have concluded that Florida Finance repossessed their vehicle. This argument is without merit.

In support of its motion for summary judgment, RLI submitted an affidavit from its Commercial Surety Claims Manager. The manager stated the Prices made their monthly payments to Florida Finance, Florida Finance repossessed the vehicle and RLI has not executed a bond in favor of Florida Finance, a company separate and distinct from First Choice. Attached to the affidavit were copies of the Prices' cancelled checks from 2001 showing their payments to Florida Finance, the Certificate of Repossession from the Division of Motor Vehicles and the demand letter from the Prices' counsel to Florida Finance.

The Certificate of Repossession states: "This Certificate of Repossession certifies that the owner/lienholder named in this document has repossessed the above described motor vehicle ..." (emphasis added) The lienholder named in the document is Florida Finance. In his letter to Florida Finance, the Prices' attorney wrote: "As you know, your company took possession of Ms. Price's

vehicle on November 2, 2001 on the stated justification that my client was in default of her loan." (emphasis added)

The Prices did not file any affidavits or submit any evidence to support a determination that First Choice had anything to do with repossessing their vehicle. At the summary judgment hearing, the Prices' attorney (the same attorney who wrote the letter) claimed the Prices simply do not know who repossessed their vehicle. However, counsel did not explain why he wrote the letter to Florida Finance if not based on the Prices' representations or the logical conclusion that Florida Finance had repossessed the vehicle since it held the paperwork. The Prices' claim that they do not know who actually repossessed their vehicle is insufficient to create a genuine issue of fact on this issue.

The Prices next argue the final default judgment against First Choice is prima facie evidence that RLI is liable for First Choice's failure to comply with the conditions of the installment sales contract, *citing Von Engineering Co. v. R.W. Roberts Const. Co., Inc.*, 457 So.2d 1080 (Fla. 5th DCA 1984). The Prices contend that RLI has not rebutted that prima facie showing and thus they are entitled to relief.

In *Von Engineering*, this court explained:

> Principles of indemnity law hold that when a surety has notice of a suit against the principal and is afforded an opportunity to appear and defend, a judgment rendered without fraud or collusion is conclusive against the surety as to all material questions therein determined. (citations omitted). A corollary to this principle is that where it is not made to appear that the surety knew of and had an opportunity to defend the suit, then the judgment is prima facie evidence that the surety is liable, sufficient to support a verdict unless it is rebutted by proof that it was obtained through fraud or collusion or that the loss of liability created by the judgment arose from acts other than those indemnified against under the conditions of the bond. (emphasis added)
>
> 457 So.2d at 1081.

The Prices concede there is no evidence to establish that RLI knew about the underlying lawsuit against First Choice prior to the entry of the judgment. In turn, RLI has conceded there is no evidence the judgment was obtained through fraud or collusion. Thus the only issue is whether RLI established the loss of liability created by the judgment arose from "acts other than those indemnified against under the conditions of the bond."

The losses claimed by the Prices-wrongfully repossessing the vehicle, failing to provide notice of the disposition of the vehicle after repossession and failure to provide the Prices with a rebate of the unearned finance charge-all relate to the repossession of the vehicle. However, the repossession of the vehicle was the "act" of Florida Finance, not First Choice. Thus the repossession was not indemnified against under the conditions of the bond which covered only First Choice.

Finally, the Prices contend that First Choice could not relieve itself of liability for breach of the installment sales contract by the simple expedient of assigning the contract to Florida Finance. The Prices argue First Choice could escape liability under the contract only if there had been a complete novation of the contract, which did not occur here. Thus the Prices argue it does not matter whether First Choice or its assignee Florida Finance repossessed the vehicle-in either case, First Choice remains responsible.

Generally, contract rights can be assigned unless they involve obligations of a personal nature, or there is some public policy against the assignment, or an assignment is specifically prohibited by the contract. *W.S. Badcock Corp. v. Webb*, 699 So.2d 859 (Fla. 5th DCA 1997); *New Holland, Inc. v. Trunk,* 579 So.2d 215 (Fla. 5th DCA 1991). Here the installment sales contract did not involve obligations of a personal nature, no public policy prohibited the assignment, and the assignment was specifically allowed by the contract.

In *Lauren Kyle Holdings, Inc. v. Heath-Peterson Const. Corp.*, 864 So.2d 55 (Fla. 5th DCA 2003), this court explained the effect of an assignment:

> An assignment is a transfer of all the interests and rights to the thing assigned. *Dept. of Rev. v. Bank of America,* 752 So.2d 637 (Fla. 1st DCA 2000); *Rose v. Teitler*, 736 So.2d 122 (Fla. 4th DCA 1999). The assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in his own name. *Dove v. McCormick*, 698 So.2d 585 (Fla. 5th DCA 1997); *State Farm Fire and Cas. Co. v. Ray*, 556 So.2d 811 (Fla. 5th DCA 1990). Because an assignment vests in the assignee the right to enforce the contract, an assignor retains no rights to enforce the contract after it has been assigned. (emphasis added)
>
> 864 So.2d at 58.

Once the installment sales contract was assigned from First Choice to Florida Finance, First Choice had no right to enforce the contract for the Prices' failure to make their payments. That interest and right belonged to Florida Finance. To hold otherwise would negate the reason and legal effect of the assignment. Since the contract had been assigned to Florida Finance and

Florida Finance repossessed the vehicle, RLI is not liable under the bond which covers only First Choice.

AFFIRMED.

SAWAYA and TORPY, JJ., concur.

B. Basic Requirements for an Assignment

The *Price* case immediately above set out three basic situations where an assignment is not proper. The *Trak Microwave, Corp*. excerpt that follows sets out the same rule, but it goes further to indicate another situation where assignment may not be permitted – where there is a lack of a current intent. This is reminiscent of the *current intent* component of an offer addressed in Chapter 1. Assignments require clear, current intent.

TRAK MICROWAVE CORP. v. MEDARIS MANAGEMENT, INC.

District Court of Appeal of Florida, Fourth District, 1970

236 So. 2d 189

REED, Judge.

* * *

STATEMENT OF THE FACTS

A. The Medaris-Ladoniczki relationship. On 8 January 1964 Medaris entered into an agreement with Joe Ladoniczki. The agreement was an informal memorandum outlining various plans for the exploitation of inventions developed by Joe Ladoniczki or his corporation, Lunar Engineering, Inc. One of the provisions in the agreement called for a loan of approximately $15,000.00 to Lunar Engineering. With respect to this loan, the contract said:

'Funds advanced under paragraphs (1) and (2) will be treated as loans to Lunar. Ladoniczki will sign appropriate promissory notes on behalf of Lunar. Ladoniczki will further sign a limited guarantee providing that any income Received by him from the sale or disposal of his existing ideas and disclosed products is pledged to guarantee the payment of these notes. Notes will bear interest at the rate of 6% Per annum computed monthly on the net amount of money advanced, and will be repayable to the Loan Fund at $1,000 per month beginning 1 August 1964, unless sooner converted in accordance with further provisions of this agreement.' (Emphasis added.)

The note executed by Lunar to Medaris contained a collateral agreement or assignment by Ladoniczki in the following language:

> 'FOR VALUE RECEIVED, the undersigned JOSEPH LADONICZKI hereby assigns as further security for the payment of the above note from LUNAR ENGINEERING, INC. to MEDARIS, CRUGER & PATTERSON, INC. * * * all income and financial benefits which may be derived after this date from inventions and/or patentable ideas owned by me, and do consider this obligation as a lien against potential receipts for such inventions and idea, until the amounts receipted hereunder, together with interest therein, have been rapaid in full.'

B. Ladoniczki-Trak relationship. By an agreement dated 19 April 1965 (after Ladoniczki had executed the note and assignment to Medaris) Ladoniczki and his wife executed a contract under which Ladoniczki sold three inventions to Trak Microwave Corporation. One of the inventions was the lamp. Under this agreement Trak was required to pay Ladoniczki $.47 for each lamp sold during a two year period. The trial court found-and there is no dispute as to this finding-that Trak manufactured under the agreement 14,619 lamps. Trak paid Ladoniczki $10,000.00 on the signing of the agreement as advance royalties on the lamp. None of this money was paid over by Ladoniczki to Medaris.

* * *

The next issue is whether or not the 'assignment' executed by Ladoniczki is enforceable against Trak as an obligor to Ladoniczki.

The assignment to Medaris was executed some months before the contract between Trak and Ladoniczki under which royalties accrued to Ladoniczki. Therefore, insofar as the assignment to Medaris relates to monies accruing under the Ladoniczki-Trak agreement, the assignment must be considered as an assignment of profits or income from contracts not in existence at the time of the assignment. There is considerable textbook law to the effect that this type of assignment is either invalid or imposes no duty upon third party obligors (in this case Trak). For example, *see* Restatement of Contracts s 154(2). See also 6 Am.Jur.2d, Assignments s 15 p. 200 wherein the editor states: '* * * Modern authorities generally recognize that an assignment of rights expected to arise under contracts not yet formed or executed is ineffective to transfer these prospective rights. * * *'

There is no Florida case dealing precisely with the type of assignment which is presently before the court. In the case of *Richardson v. Holman*, 1948, 160 Fla. 65, 33 So.2d 641, the issue before the court was whether or not a possibility of reverter created by a reservation in a conveyance of land was

assignable. The Florida Supreme Court held that it was and stated the policy of Florida as follows:

> 'In fine, the right of contract so rigidly canalized by the common law, has, by the constitution and statutes, been liberalized till at the present any citizen who is sui juris may enter into any contract that is not illegal, fraudulent, immoral or contrary to public policy. Under the common law a right of action, choses in action, future or contingent interests, possible and existing estates or interests, were not assignable, but all of these are now assignable by statute or in equity. * * *'

Based on *Richardson v. Holman*, we are of the opinion that the assignment from Ladoniczki to Medaris is valid because it offends no statute, announced rule of public policy, or constitutional provision. The difficult problem is whether or not the assignment can be enforced against a third person not a party thereto, i.e., the debtor, Trak, after Trak has paid to the assignor (Ladoniczki) the funds allegedly assigned. The resolution of this issue depends upon the distinction between an assignment of a right to receive funds and a promise by the assignor to make an assignment of funds when they come into being at some unspecified time in the future under a contract not in existence at the time of the assignment. As Williston puts it, '* * * The distinction is to be drawn between a promise that the promissor will pay out of a particular fund when he collects it and an agreement that the promissee may collect a particular fund, or part of it, and keep it when he has collected.' 3 Williston On Contracts, Third Edition, Section 428 p. 162. The Florida Supreme Court has said, '* * * The true test of an equitable assignment is whether the debtor would be justified in paying the debt to the person claiming as assignee * * *.' *McClure v. Century Estates, Inc.*, 1929, 96 Fla. 568, 120 So. 4, 10.

To apply the foregoing principles to the present case we might ask whether or not Trak was authorized by the assignment upon which Medaris relies to pay over to Medaris the money accruing to Ladoniczki. We answer this question in the negative for two reasons. First, the language of the assignment from Ladoniczki to Medaris shows on its face that its putpose was to secure the debt of Lunar Engineering to Medaris. For this reason, Lunar and Ladoniczki both had the power to extinguish the assignment by paying off the debt. Hence Trak would not have been justified in paying Medaris on the basis of the assignment alone without some further authority from Ladoniczki. Secondly, the language of the assignment does not expressly empower Medaris to collect monies directly from any of Ladoniczki's obligors-such as Trak.

For the foregoing reasons, the 'assignment' in our judgment did not create in Medaris a right to collect from Trak money due Ladoniczki. The so-called assignment was in our opinion merely an agreement by Ladoniczki to pay over

to Medaris monies which might come to him from exploitations of his inventions until the debt from Lunar to Medaris was paid. The agreement, therefore, was only enforceable against Ladoniczki. For this reason, the judgment in favor of the counterclaimant Medaris was in error.

That portion of the final judgment in favor of Medaris is vacated. On remand, the trial court is directed to enter judgment in favor of Trak and against Medaris on the latter's counterclaim.

Remanded with instructions.

McCAIN, J., concurs

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WALDEN, J., dissents (*on other grounds*), with opinion. (Dissenting opinion omitted).

C. Assignment of Contract Right Distinguished from Assignment of a Cause of Action

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CORDIS CORP. v. SONICS INTERN., INC.[54]

District Court of Appeal of Florida, Third District, 1983

427 So. 2d 782

SCHWARTZ, Chief Judge.

When a distributorship agreement between the appellee Sonics International, Inc. and Mexcor S.A. was terminated, Sonics allegedly owed Mexcor over $175,000 in commissions it had earned while the contract was in effect. Mexcor assigned the claim against Sonics to the appellant Cordis Corporation, and Cordis, in turn, sued Sonics to recover the unpaid amount. Sonics moved to dismiss the action on the ground that it had not agreed to the assignment as it asserted was required by the following provision of its agreement with Mexcor:

> The rights of Distributor [Mexcor], hereunder shall not be assigned or transferred, either voluntarily or by operation of law, without [Sonics International's] written consent, nor shall the duties of Distributor hereunder be delegated in whole or in part. Any such assignment, transfer or delegation shall be of no force or effect. This Agreement shall be binding upon Distributor and inure to the benefit of SI, its successors and/or assigns.

54

In this appeal, Cordis challenges the trial court's order granting the motion on this basis and dismissing the complaint with prejudice. We reverse.

It is clear that, while contractual provisions against assignability are generally enforceable in Florida, *Troup v. Meyer*, 116 So.2d 467 (Fla. 3d DCA 1959), the clause relied on by Sonics is inapplicable to the present situation. One which, like this, forbids only the assignment of a party's "rights" under a contract simply does not preclude the assignment of an accrued claim for damages arising from its breach. *Rosecrans v. William S. Lozier, Inc.*, 142 F.2d 118, 124 (8th Cir.1944) ("The prohibition of the contract against assignment is against an assignment of the rights and privileges under the contract. This prohibition of assignment does not, however, prohibit the assignment of a claim for damages on account of breach of the contract."); *Charles L. Bowman & Co. v. Erwin*, 468 F.2d 1293, 1297 (5th Cir.1972) ("The law draws a distinction ... between assignment of performance due under a contract and assignment of the right to receive contractual payments."); *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 182 P.2d 182 (1947); *see also, Portuguese-American Bank of San Francisco v. Welles*, 242 U.S. 7, 37 S.Ct. 3, 61 L.Ed. 116 (1916). In *Troup*, *supra*, upon which Sonics heavily relies, the contract expressly forbade the assignment of "commissions accruing under this agreement."[1] 116 So.2d at 468. *Cf. also, Rafkind v. Simon*, 402 So.2d 22 (Fla. 3d DCA 1981) (enforcing specific prohibition against assignment of partnership interest in joint venture agreement). In decisive contrast, the provision before us has no effect upon Mexcor's well-established right freely to assign its chose in action for the damages caused by Sonics' breach. *Spears v. West Coast Builders' Supply Co.*, 101 Fla. 980, 133 So. 97 (1931); *Oceanic International Corp. v. Lantana Boatyard*, 402 So.2d 507, 512 (Fla. 4th DCA 1981); 4 Fla.Jur.2d Assignments § 5 (1978). We therefore reverse the order of dismissal and remand for further consistent proceedings.

Reversed and remanded.

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[1] We need not decide either whether, insofar as it restricts the assignability of an accrued chose of action, the Troup decision should be overruled, *see Portuguese-American Bank of San Francisco v. Welles*, *supra*, or whether the UCC, which would unquestionably invalidate such a provision, Sec. 679.318(4), Fla.Stat. (1979); *Florida First National Bank v. Fryd Construction Corp.*, 245 So.2d 883 (Fla. 3d DCA 1971), applies to the instant case.

D. Effect & Operation of Non-Assignment Clauses

LEXINGTON INS. CO. v. SIMKINS INDUSTRIES, INC.

Supreme Court of Florida, 1998

704 So. 2d 1384

SHAW, Justice.

We have for review *Simkins Industries, Inc. v. Lexington Insurance Co.*, 688 So.2d 348 (Fla. 3d DCA 1997), based on conflict with *Classic Concepts, Inc. v. Poland*, 570 So.2d 311 (Fla. 4th DCA 1990). We have jurisdiction. Art. 5, § 3(b)(3), Fla. Const. We quash *Simkins*.

Simkins Industries, Inc. (Simkins) loaned WAK Limited, Inc. (WAK) approximately $5.5 million to finance WAK's ownership of the Monte Carlo Hotel on Miami Beach. In exchange for the funds, WAK executed various notes and mortgage and security agreements granting Simkins a security interest in the hotel, the land underneath it, and the personal property WAK used in connection with the hotel. WAK agreed to keep the hotel insured, assign all of the policies to Simkins, and direct all insurers to make payments to Simkins in the event of a loss. WAK procured a $2 million insurance policy with Lexington Insurance Company (Lexington) which covered loss or damage to the building, business personal property, and business income. [Footnote omitted] Simkins was named as the first mortgagee in the policy's standard loss payable clause. [Footnote omitted]

The hotel was damaged by fire in October 1993, and Simkins brought this action because Lexington agreed to cover only the building and structural damage pursuant to the mortgage clause. Simkins argues that it is entitled to recover for lost business income and business personal property pursuant to two theories: (1) under the plain language of the Declarations page, and (2) under WAK's agreement to assign the policy to Simkins. The trial court did not address the second theory, but found that as mortgagee Simkins was entitled to recover only for property damage. The district court reversed under the second theory, concluding that Simkins was entitled to recover for loss of business income and damage to business personalty pursuant to its status as assignee:

> The plain language of the assignment, not to mention the surrounding circumstances, clearly indicate that WAK assigned the policy as collateral security for the payment of its debt to Simkins. Such “assignments” (also referred to as “transfers” or “pledges”) are regarded, correctly in our view, as being outside the scope and purpose of general policy provisions against assignment without the insurer's consent....
>
> ... Moreover, the purpose of such nonassignability clauses is “to prevent an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer.” Clearly, that purpose is not implicated by the assignment in this case. Thus, the trial court incorrectly concluded that Simkins was not entitled to

> recover for the loss of business income and the loss and/or damage to personalty.

Simkins, 688 So.2d at 350 (citations omitted). Lexington claims that the district court ruled incorrectly and that the policy's "no assignment" clauses rendered it nonassignable. We agree.

Section 627.422, Florida Statutes (1995), expressly states that the terms of an insurance policy determine its assignability:

> Assignment of policies.-*A policy may be assignable, or not assignable, as provided by its terms*. Subject to its terms relating to assignability, any life or health insurance policy under the terms of which the beneficiary may be changed upon the sole request of the policy owner may be assigned either by pledge or transfer of title, by an assignment executed by the policy owner alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer. Any such assignment shall entitle the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment, until the insurer has received at its home office written notice of termination of the assignment or pledge or written notice by or on behalf of some other person claiming some interest in the policy in conflict with the assignment.

§ 627.422, Fla. Stat. (1995) (emphasis added). [Footnote omitted] The policy in the present case contains two express nonassignment clauses:

Assignment of this policy shall not be valid except with the written consent of this Company.

> Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

The purpose of a provision prohibiting assignment is simple-to protect an insurer against unbargained-for risks. [Footnote omitted] In the present case, if Simkins is permitted to recover pursuant to the assignment theory as the district court suggests, the above purpose would be frustrated in light of Lexington's arson defense against WAK. [Footnote omitted] Accordingly, based on the unambiguous language of the statute and the policy, we hold that the policy's nonassignment clauses are dispositive and WAK's purported assignment of the policy was ineffective. *See Classic Concepts*, 570 So.2d at 313 (holding that section 627.422 prohibits assignment of an insurance policy without the insurer's consent where the policy includes an unambiguous "no assignment" clause). Accordingly, we quash *Simkins*, approve *Classic*

Concepts, and remand this case for proceedings consistent with this opinion. On remand, any issues previously raised but left unresolved can be addressed.

It is so ordered.

Note

The clear public policy of the legislation at issue is to cause insureds to negotiate and reach a resolution on claims so as not to substitute the assignee's judgment, reason, and flexibility for that of some non-injured third party such as an insurance company. The District Court of Appeals for the Fourth District of Florida declined to extend the *Lexington Ins. Co.* ruling to another insurance case involving the alleged prohibition on assignment until a ruling on liability and amount was decided, based on the language: "Benefits will be paid directly to you[ ]." *See Kohl v. Blue Cross and Blue Shield of Florida*, 988 So. 2d 654, 657 (Fla. 4th DCA 2008). Thus, at least one District Court of Appeal in Florida is not inclined to extend favorable interpretation of contracts language – it was instead construed as an anti-assignment clause in favor of insurance companies. A lot of money is at stake, as is the general health of the insurance market in Florida if the cost of business becomes too high.

E. Revoking a(n) (Gratuitous) Assignment

Some topics within contract law are particularly complicated, incompletely understood, and otherwise something to be avoided where possible. A good example is the treatment of the possibility of revoking a gratuitous assignment. Review of Florida case reveals that may never have been addressed by the appellate courts (though it has been addressed in at least several unpublished opinions, including one from the 1tth Circuit Court of Miami-Dade County).[55] The making of an assignment can be, of course, for consideration. As an example: "If you have your debtor pay me the $100 that she owes you, 1 will not sue you in tort for the defamatory statement that you made." Perhaps unfortunately, assignments are usually gratuitous, i.e., the intended recipient of the assignment (note: we specifically opted not to label the recipient a *third party beneficiary*, but we would have been accurate had we done so) has not done or given anything in return. The question then becomes, if there is no consideration provided by the recipient, can the assignment be revoked before it has been performed? The answer is a resounding "maybe."

Some casebooks address the issue of gratuitous assignment in detail. We recommend reviewing Restatement (Second) Contracts § 332 and outlining its provisions. (Assignments for consideration are addressed in § 332(5)). Cutting

[55]

a few corners, the basics are that a *gratuitous* assignment is revocable unless one of several factors is true, including but not limited to the following: (1) it is in writing and signed; or (2) a court sanctifies it in judgment form. Revocation can be for example by notice or by a subsequent, inconsistent re-assignment of the thing. *Id*, § 332(2). There is also some difference between the Second Restatement (Contracts) and the First dealing especially with whether enforcement of assignment is in full or only in part - up to the level necessary to avoid injustice. We recommend thinking about it as follows: *gratuitous assignments are generally revocable, but sometimes they are not for reasons including that they are memorialized in writing, or the recipient has learned of and detrimentally relied on the assignment, or a court has sanctified its existence.* With regard to assignments supported by consideration, including for example where a recipient pays the assignee to assist with the assignment, ordinary contract rules would apply.

2. Delegations

The following excerpt involves alleged, negligent medical treatment, which all would know is often the subject of tort claims. There are significant connections between tort and contract law, and as the following case demonstrates, delegation of a duty if permitted nevertheless does not transfer the risk of breach of contract (or failure of a condition, for that matter) absent a *novation* (agreement by the party to whom a duty is owed to allow substitution of contractual responsibility to the *delegate* and off of the party who originally undertook such duty). The elements of novation are set out in the case that follows, *Sans Souci*.

A. Definition & Basic Workings

POPE v. WINTER PARK HEALTHCARE GROUP, LTD.

District Court of Appeal of Florida, Fifth District, 2006

939 So. 2d 185

GRIFFIN, J.

This appeal arises from a medical malpractice suit against Winter Park Healthcare Group, Ltd., d/b/a Winter Park Memorial Hospital [“Winter Park Hospital”], and Dr. Michael McMahan, a neonatologist, for the negligent care of Preston and Ginger Pope's [“the Popes”] newborn son, Tyler. [Footnote omitted] It was discovered after Tyler's birth that he suffered from fetal-maternal hemorrhage, [footnote omitted] and compression of the umbilical vein, which would normally have carried oxygen-rich blood to Tyler from the placenta. In the hours following his birth, Tyler's breathing became more labored and he required resuscitation; however, it was alleged that this was

not done timely or correctly, causing permanent brain damage. The Popes contend that Dr. McMahan, the on-call neonatologist, was negligent in failing to be present, in failing to communicate, in failing to order necessary tests and in failing to order the necessary means of resuscitation.

The Popes brought suit against Winter Park Hospital, Dr. McMahan and Mrs. Pope's obstetrician, Dr. Wolford, based on a claim of negligence. The Popes alleged that Winter Park Hospital was liable for Dr. McMahan's negligent acts because Winter Park Hospital had a “nondelegable” duty to treat Tyler with due care. The Popes contend that when Mrs. Pope was admitted to Winter Park Hospital for the delivery of her child, an implied contract for treatment was formed between her and Winter Park Hospital. Alternatively, they assert that the consent form that Mrs. Pope signed constitutes an express contract with Winter Park Hospital that obligates Winter Park Hospital to provide them with the medical or surgical treatments or procedures she and her son might need, the delegation of which to an independent contractor physician does not extinguish the hospital's duty. They contend that the trial court erred in directing a verdict in favor of Winter Park Hospital.

* * *

[W]e agree that Florida law does not currently recognize an implied nondelegable duty on the part of a hospital to provide competent medical care to its patients. Florida law does recognize, however, that such a duty can be undertaken pursuant to an express contract. Here, it is undisputed that an express contract exists between the Popes and Winter Park Hospital, and we have concluded that an issue remains unresolved concerning the scope of the express contractual undertaking which may have given rise to a duty to provide non-negligent neonatal care to baby Tyler. We accordingly reverse the judgment and remand. [Footnote omitted]

The independent contractor/nondelegable duty analysis that inevitably dominates most of the cases in the context of hospital liability is confusing and somewhat misleading because duties that arise under the law of tort and duties that may arise under contract are often intertwined. [Footnote omitted] The tort principle of respondeat superior makes an employer liable to third parties for the negligence of an employee, whom he controls and directs. If a hospital employs a physician, the hospital is responsible (in respondeat superior) for his or her negligence. When an independent contractor physician is hired, however, liability to third parties usually does not arise. This is because the law recognizes that a person ought to be able to hire someone to perform a specific task without exposure to liability to third parties for negligent performance of the work as long as the person doing the hiring does not retain control or direction over how the work is to be done. Thus, for example, if a hospital hires a roofing contractor to repair a roof and in the course of the job, the roofer drops a bucket on the head of a passerby, the

roofer is liable to the third person but the hospital typically is not because the roofer is an independent contractor.

Although it is the general rule that one who hires an independent contractor is not liable for injuries caused by an independent contractor's negligence, there are exceptions recognized in the law of tort. *See Carrasquillo v. Holiday Carpet Serv., Inc.*, 615 So.2d 862, 863 (Fla. 3d DCA 1993); *Fisherman's Paradise, Inc. v. Greenfield*, 417 So.2d 306, 307 (Fla. 3d DCA 1982). In fact, the Third District has referred to the rule of non-liability of independent contractors as the "riddled rule" because it is "riddled with exceptions." *See Gordon v. Sanders*, 692 So.2d 939, 941, (Fla. 4th DCA 1997); City of Coral Gables v. Prats, 502 So.2d 969, 971 (Fla. 3d DCA 1987).

As a matter of Florida tort law, the key exception to this rule of non-liability in medical negligence cases arises where the physician is either an actual or apparent agent of the hospital. *See, e.g., Roessler [v. Novak]*, 858 So.2d at 1162. The other important exception under Florida tort law, established in *Insinga v. LaBella*, 543 So.2d 209 (Fla.1989), provides that the hospital can be liable in tort for failing to exercise due care in the selection and retention of an independent contractor physician on the hospital staff. *Insinga,* 543 So.2d at 214. *Insinga* is an extension of liability under Florida law as a matter of public policy. Id. It does not supplant or eliminate any other basis for liability.

The rule of non-liability for acts of an independent contractor also fails where the duty is nondelegable, and here is where the confusion arises. In Florida case law, nondelegable duties are often said to arise out of the common law, statutes or regulations, or contract. *See Dixon v. Whitfield*, 654 So.2d 1230, 1232 (Fla. 1st DCA 1995); *E.J. Strickland Const. v. Department of Agric. & Consumer Serv.*, 515 So.2d 1331, 1334-35 (Fla. 5th DCA 1987). Under the common law, nondelegable duties typically arise out of the performance of ultra-hazardous activity. "There are no specific criteria for determining whether or not a duty is nondelegable except for the rather ambiguous defining characteristic that the responsibility is so important to the community that the [original party] should not be allowed to transfer it to a third party." *Dixon*, 654 So.2d at 1232. [ ] Florida law does not recognize that the mere relationship between a hospital and its patient gives rise to a nondelegable duty to provide competent medical care. *Roessler*, 858 So.2d at 1163. Nor, in this case, does a nondelegable duty on the part of a hospital arise out of any statute or regulation cited to us.

Concepts of "independent contractor" and "nondelegable duty" have no application, however, when a person or entity doing the hiring of the independent contractor has undertaken by contract with a third party to perform a service and hiring an independent contractor is, essentially, hiring a sub-contractor to perform the work which the hiring person has undertaken by contract to perform. This distinction was cogently explained by the Third

District Court of Appeal in *Gordon v. Sanders,* 692 So.2d 939 (Fla. 3d DCA 1997). In *Gordon*, a homeowner had hired two individuals to remove trees from his property. They, in turn, subcontracted the work to two other men. In the process of removal, one of the trees was allowed to fall on the homeowner's house, causing considerable damage. The two persons originally hired to do the work were sued, and they defended on the basis that the ones at fault were independent contractors. The *Gordon* court dispatched that defense as follows:

> The evidence in this record is sufficient to go to the jury on an exception for nondelegable duties, specifically the principle that one who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance by showing that he hired someone else to perform the task and that other person was the one at fault. *Mills v. Krauss*, 114 So.2d 817 (Fla. 2d DCA 1959), cert. denied, 119 So.2d 293 (Fla.1960). In other words, where the contracting party makes it her or his duty to perform a task, that party cannot escape liability for the damage caused to the other contracting party by the negligence of independent contractors hired to carry out the task. The record reflects sufficient evidence to go to the jury for its determination on this principle.

Id. at 941.

Although, as discussed above, this is often treated in the cases as a "nondelegable" exception to the "independent contractor" rule, in fact, contract is a distinct basis of liability and "nondelegability" is not the issue. It is an elemental aspect of contract law that, absent an agreement to the contrary, the rights accruing under a contract can be freely given up by assignment, but duties assumed under a contract cannot be transferred to another. Performance of the duties assumed under a contract are usually delegable, but, even if delegable, the delegation will not relieve the promisor of the duty to perform his obligation under the contract. Thus, if a hospital does undertake by contract to provide medical care, it cannot throw off that obligation simply by hiring an independent contractor. The use by hospitals of independent-contractor physicians eliminates "respondeat superior" liability, but it will not relieve the hospital of any contractual duties it has undertaken. A hospital can, by contract, undertake different duties or greater duties than those imposed by the common law of tort.

The decision of the First District Court of Appeal in *Shands Teaching Hospital & Clinic, Inc. v. Juliana,* 863 So.2d 343 (Fla. 1st DCA 2003), offers an example of a hospital's liability based on its contract with the patient. That case dealt with the liability of a perfusionist, a technician who was not a physician, who negligently performed his services causing severe injury to a two-month-old infant who underwent heart surgery. The *Shands* court found liability based

on the language of the hospital's express contract with the patient in the admission form to provide “such diagnostic procedures, hospital care, [and] medical treatment ... which in the judgment of my physician may be considered necessary or advisable while a patient at Shands.” 863 So.2d at 344. Importantly, the *Shands* court found that the form excluded from the definition of “hospital care [and] medical treatment” the services of “all physicians, residents and students who provide services in Shands,” but concluded the perfusionist fit within none of those exceptions. Shands contended that it was not responsible for the perfusionist's negligence because neither the perfusionist nor his employer was Shands' agent or had an appearance of an agency relationship, but the Shands court correctly distinguished between the contractual undertaking of the hospital and principles of agency or respondeat superior. *Id*. at 347-49. Agreeing with the lower court's conclusion that the perfusionist was legally a subcontractor performing the hospital's contract with its patient, the court concluded that the hospital's duty to the patient could not be unilaterally delegated without specific notice. *Id*. at 350. Because nothing in the admission form or operating permit gave the patient notice that the perfusionist was not discharging Shands' duties under its contract with the appellants, Shands could not avoid liability for negligence on the part of the party to whom Shands had delegated its own contractual duty.

The Fourth District Court of Appeal also addressed the issue of contractual liability of a hospital for physician malpractice in *Irving v. Doctors Hospital of Lake Worth, Inc.*, 415 So.2d 55 (Fla. 4th DCA 1982). The case involved the liability of a hospital for the alleged negligent diagnosis and treatment by an emergency room physician that resulted in injury to a minor. The issue there was whether certain jury instructions should have been given. The jury had found no liability because the emergency room doctor was not an employee of the hospital. The trial court gave the standard instruction on vicarious liability that the hospital was not responsible for such negligence if the person employed was an independent contractor. Appellant maintained that, even if the emergency room doctor were an independent contractor, the hospital was nevertheless liable under one of several exceptions to the independent contractor rule. Appellant requested but was denied three jury instructions on the exceptions. One instruction addressed the rule that one cannot escape his contractual liability by delegating his performance under the contract to an independent contractor. *Id*. at 59-60. The Irving court held that if the hospital was entitled to have the jury instructed on the non-liability of an independent contractor, the appellant was entitled to have the jury apprised of the exceptions to that rule. The Fourth District court said: “[1]f the trial court had instructed on these exceptions to the independent contractor rule, the jury might have found the hospital liable regardless of [the physician's] employment status.” *Id*. at 61. [Footnote omitted]

In this case, both the Popes and Winter Park Hospital agree that the consent form executed by Mrs. Pope constitutes an express contract between these parties. [Footnote omitted] They disagree, however, as to the terms and legal effect of this agreement. The consent form signed by Mrs. Pope before admission provides:

> CONSENT FOR MEDICAL AND SURGICAL TREATMENT: 1 authorize Winter Park Memorial Hospital (WPMH) to furnish the necessary medical or surgical treatments, or procedures, including diagnostic, x-ray, and laboratory procedures, anesthesia, hospital services, drugs and supplies as may be ordered by the attending physician(s), his assistants or his designees. 1 am aware that the practice of medicine and surgery is not an exact science and 1 acknowledge that no guarantees have been made to me as to the result of treatment, diagnostic procedures or examinations in the hospital. 1 recognize that the physicians who practices [sic] at WPMH are not employees or agents of the hospital but are independent physicians; the hospital may delegate to these independent physicians those services physicians normally provide; and any questions relating to care my physician has given or ordered should be directed to him/her.
>
> This consent form plainly puts the reader on notice that physicians practicing at Winter Park Hospital are independent contractors, not agents or employees. The form also authorizes Winter Park Hospital to delegate to such physicians the services physicians normally provide. The form does not, however, dispose of the question whether the delegation of the duty relieves Winter Park Hospital of liability.

Winter Park Hospital argues that the first sentence of the consent form represents an undertaking on its part only to provide those necessary medical or surgical treatments as may be ordered by the attending physician. If the physician is negligent, it reasons, Winter Park Hospital cannot be liable. Winter Park Hospital's reading of the scope of its undertaking is possible, given the syntax of the sentence, because it is unclear what “as may be ordered by the attending physician(s)” refers to. Whether their interpretation of the sentence has the legal effect they contend is not self-evident. [Footnote omitted]

This first sentence of the consent form can also be read to mean that Winter Park Hospital undertook to provide Ginger Pope and Tyler the necessary medical or surgical treatments or procedures, including whatever diagnostic, x-ray, laboratory procedures, anesthesia, etc. as may be ordered by the attending physician. Winter Park Hospital's express reservation of the right to delegate the services physicians normally provide implies a recognition on its

part that it has undertaken the duty to provide those services. A duty that does not exist cannot be delegated.

Under the law of tort, the hiring of an independent contractor, unless done negligently, precludes liability because the hiring party has no duty to an injured third party to procure non-negligent performance of the independent contractor. However, delegation of a contractual duty to an independent contractor does not eliminate the duty. Section 318 of the Restatement Second of Contracts sets forth the controlling principle of law:

> Delegation of Performance of Duty
>
> (1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.
>
> (2) Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.
>
> (3) Unless the oblige agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.
>
> (emphasis added.)

There is no language in this contract between Winter Park Hospital and the Popes of any assent by Mrs. Pope that the delegation of Winter Park Hospital's duty to provide the necessary medical treatment to independent contractor physicians will discharge the hospital from its contractual obligations. Acknowledgement on the part of Mrs. Pope that the duty to provide “medical or surgical treatments” can be delegated to an independent physician does not constitute an agreement on the part of Mrs. Pope to discharge Winter Park Hospital from any contractual duty it assumed. Delegation and discharge are two different things entirely, performed by different contracting parties. Contractual language of discharge should be clear, yet the only language in the form that may even obliquely refer to discharge is the final sentence, which provides that “questions” relating to the physician's care should be directed to the physician.

Both the Popes and Winter Park Hospital urge on appeal that the contract unambiguously means what they say it means and neither addresses any doubt about the consent form's meaning. However, we find that the contract is ambiguous and that the interpretation of this agreement potentially includes

one or more questions of fact. Given the nature of the agreement and the fact that it was drafted by Winter Park Hospital, ambiguities of the sort at issue here could be construed against the hospital, *Planck v. Traders Diversified, Inc.*, 387 So.2d 440 (Fla. 4th DCA 1980), but because the parties have barely addressed the interpretation of the contract,we leave this issue for further development on remand.

REVERSED and REMANDED. PALMER and ORFINGER, JJ., concur

Note

The term *novation* derives from the Latin nominative-case, feminine singular for "new," or *nova*. This is an example where some background in a foreign language, perhaps most particularly in Latin, can aid in understanding of a legal concept (or guessing the right way on an exam). Seeing the word *novation*, one might recall that it means something "new." In the case of a contract, it is a new agreement, i.e., the switch of responsibility from an original obligated party to a new, obligated party. The novation terminates the original obligated party's duty. Consider whether this is in the best interest of the party to whom the obligation is owed…and other related issues such as for example the potential need for consideration (addressed in Chapter 5), or for a writing (addressed in Chapter 13).

Problem 22-1

Homeowner is in search of a new landscaping company to mow her yard every week. Lawn Service recently placed an advertisement in the local paper for its lawn mowing services, and Homeowner contacts Lawn Service after seeing the ad. Homeowner enters into a valid contract with Lawn Service where Lawn Service will mow the yard weekly for $50 a week. After the first week of mowing Homeowner's yard, Lawn Service is flooded with contracts with other homeowners who have also seen the advertisement. Lawn Service quickly become overwhelmed with work. Lawn Service contacts Trusted Competitor and asks if it would be willing to take on the contract between Homeowner and Lawn Service and if Trusted Competitor would "slip into the place of Lawn Service" under the contract. If Trusted Competitor accepts this transfer or contract, has there been a valid assignment (so that Homeowner would pay Trusted Competitor)? Has there been a valid delegation? Must Homeowner be assumed to have agreed that the services could be provided not by Lawn Services but to another?

Problem 22-2

Similar facts as Problem 22-1. After Homeowner and Lawn Service enter into the valid service contract, Lawn Service receives a letter in the mail from Bank. Bank informs Lawn Service that Lawn Service has missed the last three loan payments on the loan used to purchase all of Lawn Service's mowing equipment. To appease Bank, Lawn Service contacts Homeowner and instructs Homeowner to make the $50-per-week payment under the contract directly to Bank instead of to Lawn Service. Has there been a valid assignment? Has there been a valid delegation? Who may enforce Homeowner's payment of $50 per month if Homeowner fails to pay? Must/how is Homeowner (to) know of this?

Problem 22-3

Similar facts as Problem 22-1. After Homeowner and Lawn Service enter into the valid service contract, Lawn Service receives an email from Trusted Competitor. Trusted Competitor had recently purchased equipment from Lawn Service and Trusted Competitor still owed $1,000 on the unpaid balance of the equipment. Lawn Service sent a response email to Trusted Competitor and offered to allow it to perform for 20 weeks under the contract between Homeowner and Lawn Company in full repayment of the remaining balance owed for the equipment purchase. If Trusted Competitor accepts this exchange, has there been a valid assignment? Has there been a valid delegation? If Trusted Competitor fails to mow Homeowner's lawn, against whom may Homeowner seek damages against?

B. Nature of Delegator and Delegatee Liability to Benefitted Party

Unless the party to whom a duty is owed agrees to release the party with whom he/she/it contracted in favor of holding the new performer liable (a *novation, see* next Section), the party with whom there is contractual privity remains primarily liable and would be the first one to sue where the performance fails to meet with the contractual expectations. This rule is repeated in the *Pope* excerpt above but deserves reminder.

C. Novation Removing Duty from Original Contracting Party

The authors recognize the following facts of the *Sans Souci* case are particularly complicated and unnecessary at this stage for understanding a novation. It is recommended that readers focus on the black-letter law of assignment, delegation, and novation and specifically to changes to responsibly under the contract when there is or is not a novation.

SANS SOUCI v. DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, DEPT. OF BUS. REGULATION[56]

District Court of Appeal of Florida, First District, 1982

421 So. 2d 623

ERVIN, Judge.

Appellant Sans Souci seeks review of final agency action by the Division of Florida Land Sales and Condominiums ("Division") in the form of a declaratory statement determining the rights of various condominium unit owners. Specifically, the Division determined that Sans Souci, the holder of a condominium land lease, did not have the right to exercise a rent escalation clause, thereby raising the unit owners' rent. On appeal, Sans Souci contends that the Division did not have the authority to enter such an order, in that the Division's order effectively violates the constitutional prohibition against the impairment of contractual obligations. We affirm the authority of the Division to enter the underlying order, but because we find the record inadequate to permit review of the constitutional issue, we remand jurisdiction to the Division for further proceedings, including development of a record permitting review of such issue on either of two alternative grounds.

In 1970, Vista Deluna Condominiums leased property from the Santa Rosa Island Authority, a political entity. Some time later, Gulf Florida Development Corp. received an assignment of Vista Deluna's interest. Gulf Florida then moved forward with the development of the Sans Souci condominiums project. Although the date is uncertain, Gulf Florida filed its declaration of condominium and, as exhibit H to the declaration, a master copy of a sublease.

The master sublease was the model copy of subleases to be executed between Gulf Florida and each purchaser of a condominium unit at Sans Souci. The literal wording of the lease reflects that Gulf Florida, the sublessor, agreed to lease a condominium unit and an indoor parking space to the unit purchaser. [Footnote omitted] This sublease contained a rent escalation clause, permitting a periodic escalation of the rent based on the U.S. Department of Labor Consumer Price Index. The sublease provided for a term ending in the year 2069. A number of the units had been subleased by Gulf Florida, when on June 2, 1977, Gulf Florida assigned its interest in the subleases to Sans Souci, a partnership. In late 1980, Sans Souci determined to exercise its contractual right to raise the rent on its subleases.

The condominium unit owners, through their condominium association, sought a Section 120.565, Florida Statutes (1979), [footnote omitted] declaratory

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statement from the Division in order to preclude Sans Souci from raising the rent by exercising the escalation clause in the sublease. The Division granted Sans Souci's motion to intervene. On the merits the Division determined that Section 718.401(8), Florida Statutes (Supp.1976), [footnote omitted] bars the use of escalation clauses in condominium land leases; that this section was applicable to the facts of this case; that this section went into effect on January 1, 1977, well before the June 2, 1977 date on which Sans Souci was assigned its interest in the lease as sublessor; that by virtue of the assignment, Sans Souci took subject to all Florida laws then existing, including Section 718.401(8), and that there could be no unconstitutional impairment of Sans Souci's contractual obligation, since Section 718.401(8) was in effect prior to the assignment of any interest in the lease to Sans Souci.

As to the jurisdictional problem, appellant asserts that a Section 120.565 declaratory statement is an improper vehicle to use in this case, because the appellant's constitutional rights are at stake, to wit: the application of Section 718.401(8) unconstitutionally impairs the appellant's contractual rights and appellee's obligations under the escalation clause. It is appellant's view that an administrative body has no authority to determine one's constitutional rights under a Florida law in instances whereby application of the law will prove to be unconstitutional.

We disagree. It is well established that the mere assertion “of a constitutional issue should not excuse a failure to exhaust administrative remedies.” *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695, 699 (Fla.1978). We find nothing in the record to suggest that this court will not be able ultimately to accord the appellant a determination of its constitutional rights. *Cf. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 400 So.2d 66 (Fla. 1st DCA 1981), *rev. docketed*, no. 61,027 (Fla. orally argued April 14, 1982); *Rice v. Department of Health & Rehabilitative Services*, 386 So.2d 844 (Fla. 1st DCA 1980). Certainly, the appellant has not yet been able to make a convincing showing that the Administrative Procedure Act's “impressive arsenal of varied and abundant remedies” is inadequate to achieve that aim. *State ex rel. Department of General Services v. Willis*, 344 So.2d 580, 590 (Fla. 1st DCA 1977). The appellant has shown no reason for, nor even sought, circuit court intervention seeking a declaration of the Division's lack of jurisdiction to rule on this matter, or of the facial invalidity of Section 718.401(8).

In essence, the Division has merely determined the applicability and interpretation to be placed upon Section 718.401(8), Florida Statutes (Supp.1976). This is a task for which the Division, given its regulatory responsibility over condominiums, has special expertise. Agency determinations with regard to a statute's interpretation and applicability will normally be accorded great deference, unless there is clear error or conflict with the intent of a statute. *See State, Department of Health & Rehabilitative*

Services v. Hall, 409 So.2d 193, 195 (Fla. 3d DCA 1982); *Harris Corp. v. Department of Revenue*, 409 So.2d 91, 93 (Fla. 1st DCA 1982) (Ervin, J., specially concurring); *ABC Liquors v. Department of Business Regulation*, 397 So.2d 696, 697 (Fla. 1st DCA 1981). "In such a case, the constitutional question is not independent of the agency's actions on the merits, but is inseparable from it, and the constitutional question is necessarily phrased, ingeniously or ingenuously, as a variation of the affected party's original position on the nonconstitutional question." *Key Haven Associated*, at 71.

The agency has acted properly under Section 120.565, Florida Statutes (1979), since that statute manifests the legislature's intent that, when invoked, agency declaratory statements "shall state the agency's opinion of how a specified statute applies to a particular individual in his particular circumstances." *State of Florida, Department of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So.2d 787, (Fla. 1st DCA, 1982) (Robert Smith, C.J., dissenting). Further, Section 120.565, when read together and harmonized with Section 718.401, Florida Statutes (1981), providing that condominiums may be created on lands held under lease for no less than 50 years, evinces the logical deduction that the legislature wisely perceived that problems of precisely the type involved in the case at bar would arise. In order to ensure that condominium leases comply with the provisions of Chapter 718, Florida Statutes, Section 718.501(1) affords the Division the power to (1) determine whether any person has violated Chapter 718; (2) interpret the chapter, and
(3) issue annually to condominium associations a summary of its declaratory statements. [Footnote omitted]

By rule, as required by Section 120.565, [footnote omitted] the Division, as a sub-agency of the Department of Business Regulation, has the power to issue declaratory statements to any party "who is affected or substantially affected by any Division's statutory provisions ...." Fla.Admin.Code Rule 7–3.01. The condominium unit owners sought a declaratory statement as to the applicability of Section 718.401(8) to their sublease escalation clauses, and we find that the Division properly issued a Section 120.565 declaratory statement. As such, the declaratory statement constitutes final agency action that is properly before this court for direct review, and this court may confront "the inseparable" constitutional issue. *Key Haven Associated* at 71.

Turning to the Division's conclusions of law, we observe they state that the challenged escalation clauses relate to ground or land leases. The appellant contends that the leases do not fall within the regulatory perimeters of Section 718.401(8), because the master sublease refers to a condominium unit, not land. We reject this argument. The master sublease by its own terms subleases to the purchaser of a condominium unit his or her own unit. We are unable to understand how or why someone would purchase a unit from a

developer and at the same time agree to lease the same unit from the developer until the year 2069.

This ambiguity is one that may be unraveled by the agency as a matter of law, since the parties' intent can be ascertained from the terms of the written master sublease. *Cf. State Department of Health and Rehabilitative Services v. Framat Realty, Inc.,* 407 So.2d 238 (Fla. 1st DCA 1981); *Key Haven Associated*, at 71; *Peacock Construction Co. v. Modern Air Conditioning, Inc.*, 353 So.2d 840, 842 (Fla.1977), see also 11 Fla.Jur.2d Contracts § 102 (1979). Because the master sublease was drafted by the appellant's predecessor in interest, Gulf Florida, the ambiguity should be construed most strongly against the appellant. *Rubin v. Beville*, 132 So.2d 783, 785 (Fla. 1st DCA 1961); 11 Fla.Jur.2d Contracts, § 106 nn. 78–80 (1979). Our consideration of both the facts in the foregoing paragraph surrounding execution of the individual subleases, and the literal wording of the subleases indicates that they involve subleases of land. First, the subleases call for the lease of a condominium unit and a parking space. As a practical matter, it seems certain that at least some of those units and parking spaces would be placed on land.

Second, the subleases, as characterized by the master sublease, are precisely what the title expressly states. They are subleases. Axiomatically, for there to be a sublease there must also be a lease. The lease in this case is between the Santa Rosa Island Authority and, by assignment, Sans Souci. It is a lease for land, and the lease and its terms are specifically incorporated into the subleases. Not coincidental is the fact that the lease and the subleases all terminate in December, 2069. Clearly, the parties at bar could not have intended to have entered into a sublease of condominium units, since the Santa Rosa/Sans Souci lease was one for land.

Having determined that the subleases were land subleases, we next confront appellant's contention that application of Section 718.401(8) unconstitutionally impairs the contractual obligations embodied in the subleases. The conclusions of law by the Division include a determination that Section 718.401(8), effective as of January 1, 1977, [footnote omitted] was applicable, because appellant Sans Souci had no rights in the subleases until June 2, 1977. However, for purposes of considering whether there has been an unconstitutional impairment of a contractual obligation by statutes regulating condominiums, such as Section 718.401(8), Florida Statutes (Supp.1976), there must be determined the date of filing of the superior declaration of condominium and its subordinate documents, such as the master sublease, since such date controls for purposes of fixing the parties' rights and obligations. *Tradewinds of Pompano Association, Inc. v. Rosenthal*, 407 So.2d 976, 977 (Fla. 4th DCA 1981); *accord*, *Hovnanian Florida, Inc. v. Division of Florida Land Sales*, 401 So.2d 851 (Fla. 1st DCA 1981), *rev. denied*, 415 So.2d 1360 (Fla.1982). Thus, the law on the date of filing of the foregoing documents engrafts the law of Florida into the documents, as if it were expressly stated in

the documents. *Cf. National Merchandise v. United Service Automobile Association*, 400 So.2d 526, 531 (Fla. 1st DCA 1981).

It is unclear as to precisely what date the declaration of condominium and its attached exhibit, the master sublease, were filed, since the declaration was not made a part of the record on appeal, nor is a recorded copy of the master sublease included in the record. The record indicates that many of the subleases between Gulf Florida and the individual unit owners were consummated during 1974 and 1975. It is therefore obviously reasonable to conclude that the master sublease was recorded sometime prior to those dates. The Division, by reaching its legal conclusion, has ignored the date of filing of the condominium declaration and master sublease. Instead, the Division relies on June 2, 1977, the date Gulf Florida assigned its rights to Sans Souci, as fixing Sans Souci's rights and obligations.

Because the record before us is insufficient to sustain the Division's finding that the law in effect at the time of the execution of the lease between Gulf Florida and Sans Souci controlled the question of whether Sans Souci was permitted to escalate the rents, that finding must be reversed and the cause remanded for the purpose of conducting further proceedings directed to the following two alternative issues: First, did the superior declaration of condominium or its master sublease, incorporate the “automatic amendment theory”, permitting the declarations to be amended from time to time, by later amendments of the Condominium Act? If so, there would be both a legal and evidentiary basis for the Division's finding, now necessary for the Division to consider. If not, the Division would next be required to determine whether the lease assignment between Sans Souci and Gulf Florida was a novation. [Footnote omitted]

1.

In order for the Division to address the first alternative issue, the record will require supplementation by the addition of a recorded copy of the declaration of condominium. *See Suntide Condominium Association, Inc. v. Division of Florida Land Sales & Condominiums*, 409 So.2d 65 (Fla. 1st DCA 1982). Although, as stated, the date of filing of the declaration of condominium and the master sublease fixes the rights and obligations of the parties and will many times determine which statutes are applicable to a given cause, *Tradewinds of Pompano*, our research reveals that it has been routine for many developers to include a clause in their declarations of condominium incorporating the provisions of the Condominium Act by the reference “as the same may be amended from time to time.” [Footnote omitted] Known as the “automatic amendment theory,” [footnote omitted] the legal effect of such a clause is to apply all subsequent amendments of the Condominium Act to the declaration, as if expressed therein. *See Century Village, Inc. v. Wellington, E,*

F, K, L, H, J, M, & G, Condominium Association, 361 So.2d 128, 132–133 (Fla.1978); 17 Am.Jur.2d Contracts § 257 n. 18 (1964).

We acknowledge that the master sublease depicted in the record before us has a clause incorporating all existing laws without using language bringing the "automatic amendment theory" into play. Such omission, is not crucial, however, to the determination of the first issue because, as explained in *Cole v. Angora Enterprises, Inc.*, 403 So.2d 1010, 1012 (Fla. 4th DCA 1981), it is the language in the superior declaration of condominium that controls over the subordinate master sublease language. In Cole, the Fourth District noted that the lease "was obviously intended to be an integral part of the whole," and that the declaration of condominium referred to the "attached" lease. The case at bar appears very similar, since the master sublease refers to itself as "Exhibit H to Declaration of Condominium For Sans Souci." [Footnote omitted]

Thus, if the condominium declaration includes the "from time to time" language that calls for application of the "automatic amendment theory," it would be entirely appropriate for the Division to construe the declaration and the master sublease, two form documents drafted by the developer, most strictly against the drafter and apply the "automatic amendment theory" to the master sublease. [Footnote omitted] As expressed by Judge Letts:

It is perfectly obvious that the "from time to time" language was intended to provide a safety valve and fall back position for the developer to insure the continuing integrity of the condominium from the vagaries of the legislature and the appellate courts. However, the developer-lessor should not expect to be able to invoke the "from time to time" language when it suits its purpose to do so and reject it when not to its taste and advantage. *Cole*, at 1012.

Assuming that the automatic amendment theory is applicable, the law in effect at the time the agency rendered its declaratory statement would control the condominium declaration and master sublease. Section 718.401(8)(a), Florida Statutes (1981), [footnote omitted] quite clearly states the inclusion or enforcement of land lease rent escalation clauses of the type in the master sublease is void as being contrary to public policy. Although the Division's determination was based upon Section 718.401(8), Florida Statutes (Supp.1976), we view that section as having a similar prohibition against the inclusion or enforcement of rent escalation clauses in residential condominium land leases as is provided in the 1981 statute. And, while the wording in the version of the statute as applied by the Division in the case at bar is slightly different from the wording in the 1981 version, we view such change as formal only, acting merely as a vehicle for clarification of existing policy. *Williams v. Hartford Accident and Indemnity Co.*, 382 So.2d 1216, 1220 (Fla.1980); *Speights v. State*, 414 So.2d 574, 577 (Fla. 1st DCA 1982).

2.

If no automatic amendment clause is contained in the condominium declaration or the master sublease, it will be necessary for the Division to determine next whether the assignment to Sans Souci may be considered a novation. Although normally an assignment involves only the act of a new party, the assignee, stepping into the shoe of the assignor, *People v. Wurster*, 97 Ill.App.3d 104, 52 Ill.Dec. 648, 422 N.E.2d 650, 652 (1981), resulting in the assignee to the lessor's interest in a term of years acquiring all the rights of the lessor, 51C C.J.S. Landlord and Tenant § 42d (1968), an assignment, under certain circumstances, can also be a novation. *See, e.g., Moring v. Miller*, 330 So.2d 93 (Fla. 1st DCA 1976) and *Reeves v. Don L. Tullis & Associates, Inc.*, 305 So.2d 813 (Fla. 1st DCA 1975). One Florida court has observed that "[a] novation is a mutual agreement between the parties concerned for the discharge of a valid existing obligation by the substitution of a valid new contract ...." *Miami National Bank v. Forecast Construction Corp.*, 366 So.2d 1202, 1204 (Fla. 3d DCA 1979). However, the drafters and reporters of the American Law Institute would refer to the foregoing as only a substitute contract. See 2 Restatement (Second) of Contracts § 279 (1981). Novations are more correctly viewed as a particular genre of substitute contract: "A novation is a substitute contract that includes as a party one who was neither the obligor nor obligee of the original duty." *Id.* at § 280.

If the Sans Souci assignment may be properly regarded as a novation, there would be no unconstitutional impairment of a contractual obligation. Plainly, the obligation of a contract is not impaired if the parties agree to substitute a new contract for a prior agreement. Higbie v. County of Los Angeles, 47 Cal.App.2d 281, 117 P.2d 933, 938 (1941); 16A Am.Jur.2d Constitutional Law § 695 n. 97 (1979). Hence, we would be required to affirm the Division's determination to apply Section 718.401(8), because the statute, effective on January 1, 1977, came into existence prior to the June 2, 1977 assignment of the leasehold. A "lease made subsequent to the enactment of a statute cannot be impaired by it." Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 249, 42 S.Ct. 289, 292, 66 L.Ed. 595 (1922).

As a general rule, there are four essential elements necessary to form a substitute contract or novation, including: (1) the existence of a previously valid contract; (2) the agreement of all the parties to a new contract; (3) the extinguishment of the original contractual obligation, and (4) the validity of the new contract. *City of Buford v. International Systems, Inc.*, 158 Ga.App. 682, 282 S.E.2d 165 (1981); *Moody v. Bogue*, 310 N.W.2d 655 (Iowa App.1981); and *Sims v. Craig*, 96 N.M. 33, 627 P.2d 875 (1981); *accord*, *United Bonding Insurance Co. v. Southeast Regional Builders, Inc.*, 236 So.2d 460, 463 (Fla. 1st DCA 1970). The record before us appears to satisfy the first and fourth requirements, but we cannot ascertain, due to the state of the record, whether the assignment satisfies the second and third prerequisites.

Consequently, the case will have to be remanded for further proceedings necessary to determine this issue, including the supplementation of the record, if possible. *See Suntide Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums*, 409 So.2d 65, 67 (Fla. 1st DCA 1982).

The parties should recognize that a novation is a form of affirmative defense, and the party who advocates a novation has the burden of proving it by clear, satisfactory evidence. *Rodeway Inns of America v. Alpaugh*, 390 So.2d 370, 372 (Fla. 2d DCA 1980); *Miami National Bank*, 366 So.2d at 1204. Therefore, it will be the responsibility of the appellee La Plaza Condominium Association and the unit sublessees to present satisfactory proof, since the novation is to their benefit.

We must now analyze what proof is necessary to sustain a finding that the assignment before us may be considered a novation. First, there must be proof of an extinguishment of the original contractual obligation. As one treatise has noted, "A novation by the substitution of landlords may result where a landlord has transferred his interest in the premises and the tenant accepts the new landlord and releases the old one from his obligations under the lease." 66 C.J.S. Novation § 18(2) n. 17 (1950). A sublessor, such as Sans Souci's predecessor in interest, has certain obligations to its sublessees, including that of maintaining the sublessor in quiet possession through an implied covenant of quiet enjoyment. *See Hankins v. Smith*, 103 Fla. 892, 138 So. 494, 496 (1931); 34 Fla.Jur.2d Landlord & Tenant § 49 (1982). Consequently, the evidence must show not only an acceptance by the sublessees of Sans Souci, as the new sublessor, but it must also show a discharge by the sublessees of Gulf Florida's obligations, such as its keeping the sublessees in quiet possession of their land. *Knapp v. Guerin*, 144 La. 754, 81 So. 302, 304–305 (1919).

Furthermore, the sublessees' debts and any other obligations to Gulf Florida must be extinguished. The fact that the debts for the same terms and amounts may have merely been transferred to Sans Souci is no bar to a determination that the original contractual obligation was extinguished, since a novation may occur if the performance to be rendered to a new creditor or obligee is the same as under an original contract. Restatement, supra, at § 280 comment a. A problem arises, however, if the older debt and concomitant obligations have not been extinguished, and the sublessees would somehow continue to be liable under the prior contract to Gulf Florida.

The Division must also ascertain whether the sublessees have consented to Sans Souci as the new sublessor. *State Savings & Loan Association v. Kauaian Development Co.*, 50 Haw. 540, 445 P.2d 109, 120 (1968); *Knapp*, 81 So. at 305. Consent must be express and will not be implied. 66 C.J.S. Novation, supra, § 18 at n. 19. This is because a novation is predicated upon consent, and the implication of consent based upon actions of the sublessees, such as

the payment of rent to the new sublessor, does not rise to the level of the express consent required. *Knapp*, 81 So. at 305; *accord*, *Prucha v. Guarantee Reserve Life Insurance Co.*, 358 So.2d 1155, 1157–1158 (Fla. 3d DCA 1978), *cert. denied*, 370 So.2d 459 (Fla.1979); *cf. Palmetto Manufacturing Co. v. Parker & Anderson,* 123 Ga. 798, 51 S.E. 714, 715–716 (1905).

The issue of consent is particularly troublesome in that there is a distinct difference of opinion among the various jurisdictions in regard to the requirement that the consent of all parties to the novation must be contemporaneous. See 58 Am.Jur.2d Novation § 19 (1971); Annot., 61 A.L.R.2d 755 § 4 nn. 18, 20 (1958). Some jurisdictions apparently do not require a contemporaneous consent. *See Greenwood Leflore Hospital Commission v. Turner*, 213 Miss. 200, 56 So.2d 496 (1952); *F.1. Somers & Sons, Inc. v. LeClerc*, 110 Vt. 408, 8 A.2d 663, 665 (1939); *Dunn v. Clinchfield R. Co.*, 19 F.2d 810, 813 (6th Cir.1927), *cert. denied*, 275 U.S. 557, 48 S.Ct. 117, 72 L.Ed. 424 (Tenn. law); *Silver v. Morin*, 74 Mont. 348, 240 P. 825, 826 (1925*); Martin v. Leeper Bros. Lumber Co.*, 48 Okl. 219, 149 P. 1140 (1915). Other jurisdictions have found a purported novation to fail in the absence of a contemporaneous consent by all involved. *Scott v. Wyoming Oils*, 52 Wyo. 433, 75 P.2d 764, 772 (1938); *Swift & Co. v. Madden*, 35 S.W.2d 59 at 59 (Mo.App.1931); *Horn v. McKinney*, 5 Ind.App. 348, 32 N.E. 334, 335 (1892); *cf. Scarboro v. Universal C.1.T. Credit Corp.*, 364 F.2d 10, 14 (5th Cir.1966) (Ga. law).

Apparently, no Florida court has squarely confronted this issue. We have attempted to ascertain the reasoning for requiring a contemporaneous consent and can only point to rather unpersuasive language in *Wyoming Oils*, wherein the Wyoming Supreme Court stated that a novation "cannot be made binding by the subsequent acquiescence or ratification without a new consideration or the existence of facts which will constitute an estoppel." 75 P.2d at 772. Without belaboring the matter, we are unpersuaded by this argument and prefer to adopt the more modern position advocated by the drafters of the Restatement (Second) of Contracts. The drafters have noted that an assent or consent at the same place or time need not be demanded. Thus, as applied to the present case, all that is required is that the consent should be so certain as to assure the Division that the manifestations refer to one another. Restatement, supra, § 280 at comment c.

In proving the existence of: (1) the extinguishment of the debt between Gulf Florida and the sublessees and (2) the agreement of all parties, the sublessees will be required to present documentary proof, because the sublease novations involve a term in excess of one year. *Rodeway Inns of America*, 390 So.2d at 372 n. 1. If the documentation exists, it should be included in the record.

Affirmed in part, reversed in part, and remanded for further consistent proceedings.

McCORD and SHAW, JJ., concur.

Note

The *Sans Souci* case involved a Florida administrative body – the Division of Florida Land Sales and Condominiums. Admittedly this is not a primary topic of contract law, but a basic understanding of administrative law may prove useful. Often, government entities (federal government, state governments, even sub-state municipal governments such as counties) create special systems, or "governments in microcosm" to deal with a very specific set of issues. Examples include systems involved in worker's compensation, labor unions, social security, and even real estate building and zoning requirements. By legislative fiat, these systems are established and typically include a rule-making body (legislative – e.g., zoning council), a rule-interpreting body (quasi-judicial, e.g., a zoning board), and an enforcement element (executive, e.g., a building inspector or zoning enforcement division). The executive creates the day-to-day rules and guidelines in which it specializes. The quasi-judicial body makes determinations in cases of requests for change, factual disputes, etc. The executive enforces the rules and guidelines of the executive, as well as the rulings of the quasi-judicial body. In very broad strokes, administrative bodies are specialized governments-in-microcosm that address specific categories of interest so that such issues only reach the "macro" level (federal, state, or sub-state) if there has been an abuse of power or constitutional violation by the administrative system.

The rules and the decisions made by these mini-governments can be challenged in regular Article 3 courts.[57] However, the Article 3 courts do not have nearly the same level of expertise as do the bodies within an administrative system. For this reason, Article 3 courts are loathe to second-guess the pronouncements of specialized bodies and therefore treat such pronouncements with great deference. Generally, the pronouncements made by the organs of these mini-governments are very hard to overturn in the Article 3 system. Either there would need to be a clear abuse of discretion, or a ruling outside of that organ's authority, or a constitutional violation for there to be any relief in an Article 3 Court. For a general discussion of the Administrative Procedure Act, *see, e.g.,* R. Pierce, *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. J. 185 (1996). Florida's adoption of the Administrative Procedures Act is found in Title 10, Part X, Chapter 120 of the Florida Statutes (Fla. Stat. (2017) § 120.50 *et seq*.).

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The study of administrative law and administrative legal systems could take lifetimes. A brief understanding sufficient for purposes of this Chapter can be gleaned from an encyclopedia, including none other than Wikipedia. For the federal APA, *see Administrative Procedure Act (United States)*, WIKIPEDIA (last visited Apr. 19, 2018), https://en.wikipedia.org/wiki/Administrative_Procedure_Act_(United_States), and for information on the Model State Administrative Procedure Act promulgated by the Uniform Law Commission on which State APAs are modeled, *see Uniform Law Commission*, WIKIPEDIA (last visited Apr. 19, 2018), https://en.wikipedia.org/wiki/Uniform_Law_Commission.

Problem 22-4

Similar facts as Problem 22-1. Before Trusted Competitor agrees to take the place of Lawn Service in the contract between Homeowner and Lawn Service, the three parties sit down and draft another contract whereby Homeowner releases Lawn Service from having to perform under the contract, Lawn Service relinquishes any payments under the contract, and Trusted Competitor is replaced with all of the original rights and duties of Lawn Service in the original contract. All three parties sign the contract. Has there been a valid assignment? Has there been a valid delegation? If Trusted Competitor fails to mow Homeowner's lawn, who may Homeowner seek damages against?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 22

68. The situations when assignments and delegations may, and many not be effectuated

69. Novation in the context of a delegation of duty

SUGGESTED EXERCISE(S)

(55) Identify which sections in the Restatement (Second) Contracts match those of FLA. STAT. §§ 672.210 (1), (2), (4) & (5) (2017). Determine whether there significant differences between the sale-of-goods rules and the common law.

(56) Try to craft a shortlist of each major issue distinguished and addressed by the court in *Sans Souci*. Often but not always, separate paragraphs represent the treatment of a single, unique issue. After developing the list, locate the case in an official reporter and compare your list to the headnotes as a lesson in issue-spotting.

CHAPTER 23: SPECIAL CONTRACTUAL RELATIONSHIPS INVOLVING THIRD PARTY BENEFICIARY LAW & ASSIGNMENT/ DELEGATION LAW

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Complex projects, such as major construction projects and medical treatments (involving hospitals, insurers, patients, etc.), are comprised significantly of two-party contracts where there will be some residual effect on some non-signatory third party. This Chapter will address some of the unique contractual issues experienced in these two areas. Though not covered in this Chapter, it is important to remember that maritime law is another specialized area of law which has developed its own body of specialized contract laws and practices. Since this is somewhat of a non-traditional chapter, it dispenses with Problems and with CMM Approaches. Rather than focus on basics, the topics covered in this Chapter rely on the basic rules but build onto them based on the specifics of the industry at issue, which is usually highly regulated (and therefore involves issues of statutory incorporation, sovereign immunity, etc.).

1. Insurance Company Special Issues

The *Foundation Health* case involves the highly regulated medical insurance/payment-for-medical-services area. There are contracts of insurance as well as contracts for either providing health care or providing insurance to pay for it. In numerous cases, there are at least three different parties involved, and any of the two-party contracts often benefit a third party, either directly or incidentally. This case incorporates statutory health insurance law into a contract between an HMO and an individual by way of implying in fact the law's provisions. This was addressed in Chapter 17. It also sets out the

Florida Supreme Court's test for when a contract has as its clear or manifest intention a benefit to a third party not a signatory to the contract at issue.

FOUNDATION HEALTH v. WESTSIDE EKG ASSOCIATES

Supreme Court of Florida, 2006

944 So. 2d 188

BELL, J.

We have for review *Westside EKG Associates v. Foundation Health*, 932 So.2d 214 (Fla. 4th DCA 2005), in which the Fourth District Court of Appeal certified the following question to be one of great public importance:

> ARE THE PROMPT PAY PROVISIONS OF THE HEALTH MAINTENANCE ORGANIZATION ACT ENFORCEABLE BY COURTS IN AN ACTION FOUNDED ON PRINCIPLES OF BREACH OF CONTRACT BROUGHT AGAINST A HMO BY A SERVICE PROVIDER?

Id. at 220. We have jurisdiction,[1] and rephrase the question as follows:

> MAY A MEDICAL SERVICE PROVIDER BRING A CAUSE OF ACTION FOR BREACH OF A THIRD–PARTY BENEFICIARY CONTRACT BASED ON ALLEGATIONS THAT THE HMO FAILED TO COMPLY WITH THE "PROMPT PAY PROVISIONS" OF THE HEALTH MAINTENANCE ORGANIZATION ACT?

We answer the rephrased question in the affirmative. A medical service provider may bring a cause of action as a third-party beneficiary to the contract between the health maintenance organization and its subscriber based on allegations that the health maintenance organization failed to comply with section 641.3155, Florida Statutes (2001), the "prompt pay provisions" of the Health Maintenance Organization Act.

FACTS

On September 20, 2001, Westside EKG Associates ("Westside")[2] filed a complaint against seven health maintenance organizations ("HMOs"). After the HMOs unsuccessfully attempted to remove the case to federal court, the

case was returned to the Seventeenth Judicial Circuit Court in Broward County, where Westside filed an amended complaint that asserted three causes of action. The only cause of action at issue before us is Westside's common law claim for breach of a third party beneficiary contract.

The amended complaint alleged that “the Defendants' insureds [sic] members sought and received emergency and non-emergency medical services from [Westside] and its physicians under insurance/health maintenance policies.” Westside claimed it was a third-party beneficiary to “such insurance/health maintenance contracts,” and “[d]espite repeated demands,” the defendant-HMOs had breached this contract by, among other things, violating section 641.3155, Florida Statutes (2001), the “prompt pay provisions” of Florida's Health Maintenance Organization Act (“HMO Act”), and sections 641.17–641.3923, Florida Statutes (2001).3 “As a direct and proximate result of such Breach of the Third Party Beneficiary Contracts,” Westside claimed it “suffered damages in the amount of outstanding balances for its charges for services, together with interest and reasonable attorneys fees and costs.”

Section 641.3155 provides a time frame in which HMOs must respond to and pay claims properly submitted by medical service providers. At the time Westside filed its complaint in 2001, the pertinent part of the statute read as follows:

> **641.3155 Payment of Claims.—**
> ....
>
> (2)(a) A health maintenance organization shall pay any clean claim or any portion of a clean claim made by a contract provider for services or goods provided under a contract with the health maintenance organization or a clean claim made by a noncontract provider which the organization does not contest or deny within 35 days after receipt of the claim by the health maintenance organization which is mailed or electronically transferred by the provider.
>
> (b) A health maintenance organization that denies or contests a provider's claim or any portion of a claim shall notify the provider, in writing, within 35 days after the health maintenance organization receives the claim that the claim is contested or denied. The notice that the claim is denied or contested must identify the contested portion of the claim and the specific reason for contesting or denying the claim, and, if contested, must include a request for additional information. If the provider submits additional information, the provider must, within 35 days after receipt of the request, mail or electronically transfer the information to the health maintenance organization. The health

maintenance organization shall pay or deny the claim or portion of the claim within 45 days after receipt of the information.

(3) Payment of a claim is considered made on the date the payment was received or electronically transferred or otherwise delivered. An overdue payment of a claim bears simple interest at the rate of 10 percent per year. Interest on an overdue payment for a clean claim or for any uncontested portion of a clean claim begins to accrue on the 36th day after the claim has been received. The interest is payable with the payment of the claim.

(4) A health maintenance organization shall pay or deny any claim no later than 120 days after receiving the claim. Failure to do so creates an uncontestable obligation for the health maintenance organization to pay the claim to the provider.
....

(7)(a) A provider['s] claim for payment shall be considered received by the health maintenance organization, if the claim has been electronically transmitted to the health maintenance organization, when receipt is verified electronically or, if the claim is mailed to the address disclosed by the organization, on the date indicated on the return receipt. A provider must wait 45 days following receipt of a claim before submitting a duplicate claim.
....

(8) A provider, or the provider's designee, who bills electronically is entitled to electronic acknowledgement of the receipt of a claim within 72 hours.
(9) A health maintenance organization may not retroactively deny a claim because of subscriber ineligibility more than 1 year after the date of payment of the clean claim.

(10) A health maintenance organization shall pay a contracted primary care or admitting physician, pursuant to such physician's contract, for providing inpatient services in a contracted hospital to a subscriber, if such services are determined by the organization to be medically necessary and covered services under the organization's contract with the contract holder.

§ 641.3155, Fla. Stat. (2001). In addition, this statute defined the term “clean claim,”[4] imposed nearly reciprocal obligations on providers to respond to an HMO's claim for overpayment, and required that the amount of overpayment be reconciled to specific claims unless the parties agree otherwise. § 641.3155(1), (5)–(6), Fla. Stat. (2001).[5]

The HMOs moved for judgment on the pleadings, which the trial court granted after conducting a hearing on the motion and a later status conference. The trial court's final judgment on the pleadings dismissed Westside's amended complaint with prejudice because it did "not allege cognizable causes of action" under *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842 (Fla.2003).

On appeal, the Fourth District Court of Appeal reversed the trial court and remanded the case for further proceedings. *Westside*, 932 So.2d at 220. The Fourth District held that *Villazon* was not "applicable to an action founded on a theory of breach of contract," because, while *Villazon* denies the existence of a private cause of action under the HMO Act, it also "acknowledge [s] the plaintiff's underlying right to bring a common law negligence claim based upon the same allegations." Id. at 216 (*citing Villazon*, 843 So.2d at 852). In assessing whether Westside has an available breach of contract claim, the Fourth District relied on the "accepted principle of law that when parties contract upon a matter which is the subject of statutory regulation, the parties are presumed to have entered into their agreement with reference to such statute, which becomes a part of the contract." Id. It then recognized that "[s]ervice providers are recognized as third party beneficiaries of insurance contracts in other contexts" and that an insurer's failure to pay a medical service provider is a valid basis for a breach of contract action. Id. at 219 *(citing Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla.2003)). Based on this analysis, the Fourth District ultimately "conclude [d] that service providers, claiming as third party beneficiaries under a subscriber's contract, may bring an action founded on the HMOs' failure to comply with the prompt pay provisions of the [HMO] Act." *Id*. at 220. "Recognizing the potential impact of this decision on the [HMO] industry," the Fourth District certified the above stated question as one of great public importance. *Id*.

We agree with the Fourth District. As we explain below, medical service providers may bring a breach of contract action as a third-party beneficiary of the contract between the HMO and its subscriber based upon the HMO's failure to comply with section 641.3155, Florida Statutes (2001).

ANALYSIS

1. Framework for Review

The question at issue requires us to interpret the HMO Act, particularly section 641.3155, its "prompt pay provisions;" therefore, the standard of review is de novo. *See Aramark Unif. & Career Apparel, Inc. v. Easton,* 894 So.2d 20, 23 (Fla.2004) (recognizing that questions of statutory interpretation are reviewed de novo).

The HMO Act does not expressly authorize a private cause of action to enforce its provisions. However, as the Fourth District correctly observed, "[t]his does not ... preclude the right to bring a common law ... claim based upon the same allegations." *Villazon*, 843 So.2d at 852*, cited in Westside,* 932 So.2d at 216; *see also Greene v. Well Care HMO, Inc.*, 778 So.2d 1037, 1041–42 (Fla. 4th DCA 2001) (finding that the HMO Act does not authorize a private cause of action, but permitting appellants to amend their complaint to state a common law cause of action based on the HMO's allegedly improper action).

In this case, Westside has asserted the breach of a third-party beneficiary contract. Assuming the complaint sufficiently alleges each of the four elements of this cause of action,[6] we must decide (1) whether the "prompt pay provisions" of the HMO Act can be incorporated into the contract between the HMO and its subscribers, and (2) whether Westside's status as a nonparticipating provider precludes it, as a matter of law, from establishing that the contracting parties had a "clear or manifest intent" to benefit Westside. We conclude that, given the significant statutory regulation surrounding HMO contracts and the integral role the "prompt pay provisions" play in them, section 641.3155 may be incorporated into the HMO contract. Then, recognizing that medical service providers previously have been considered intended beneficiaries of insurance contracts under Florida law, we extend the same recognition to HMO contracts. In essence, we conclude that unless the language of the specific contracts properly provides otherwise, Westside's status as a nonparticipating provider does not preclude it, as a matter of law, from establishing the intent element in a breach of third-party beneficiary contract claim. These conclusions are explained in more detail below.

A. Elements of Breach of a Third–Party Beneficiary Contract Claim

As the Fourth District correctly held, an allegation that an HMO violated the "prompt pay provisions" is not sufficient by itself to establish a private cause of action. *Westside*, 932 So.2d at 216 (*citing Villazon*, 843 So.2d at 852). Instead, a party must bring a recognized common law cause of action. As stated earlier, one of the claims Westside attempted to plead in its amended complaint was a common law cause of action for breach of a third-party beneficiary contract.

To establish an action for breach of a third party beneficiary contract, Westside must allege and prove the following four elements: "(1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach." *Networkip, LLC v. Spread Enters., Inc.*, 922 So.2d 355, 358 (Fla. 3d DCA 2006) *(citing Biscayne Inv. Group, Ltd. v. Guar. Mgmt. Servs., Inc.*, 903 So.2d 251, 254 (Fla. 3d DCA 2005)). While we decline to decide from

the limited record on appeal whether Westside's complaint is sufficient to establish each of these elements, we find no support for the HMOs' assertion that Westside is precluded as a matter of law from pursuing such a cause of action. *See A.R. Moyer, Inc. v. Graham*, 285 So.2d 397, 402 (Fla.1973) ("Without viewing the [contract at issue], which is absent from the record, we are unable to speculate if a cause of action would exist."). As the Fourth District correctly concluded, section 641.3155 can be incorporated into the HMO contract. Such an incorporation supports the first and third elements of the claim. Moreover, there is no basis to conclude that Westside is precluded, as a matter of law, from establishing the second element because of its status as a nonparticipating provider.

B. Statutory Incorporation

As stated earlier, we conclude that section 641.3155 (the "prompt pay provisions") may be incorporated into an HMO contract for the purpose of establishing a breach of contract cause of action when the provider's claim is for a service the HMO is required to provide under either the HMO Act or the HMO contract at the time the claim is filed.

Florida courts have long recognized that the statutory limitations and requirements surrounding traditional insurance contracts may be incorporated into an insurance contract for purposes of determining the parties' contractual rights. *See Citizens Ins. Co. v. Barnes*, 98 Fla. 933, 124 So. 722, 723 (1929) (finding an ordinance is "part of the contract of insurance" because there was no reason not to apply the "general doctrine that, where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract"); *see also Weldon v. All Am. Life Ins. Co.*, 605 So.2d 911, 914 (Fla. 2d DCA 1992) (applying the general principle to determine the extent to which a chiropractor's services were covered under an insurance policy). As are traditional insurance contracts, HMO contracts are surrounded by the extensive "statutory limitations and requirements" of the HMO Act. Therefore, for purposes of statutory incorporation, HMO contracts should be treated the same as traditional insurance contracts. *See Pasteur Health Plan, Inc. v. Salazar*, 658 So.2d 543, 544 (Fla. 3d DCA 1995) (upholding a trial court's decision that used five Florida statutes to define a term in an HMO contract, and *quoting U.S. Fid. & Guar. Co. v. Group Health Plan of SE. Mich.*, 131 Mich.App. 268, 345 N.W.2d 683, 685 n. 1 (1983), for the proposition that "[a]lthough ... HMOs are not (traditionally defined) insurance companies, ... the same contract construction rules apply"). So treated, the principles of statutory incorporation permit the "prompt pay provisions" of section 641.3155 to be considered an implicit part of every HMO contract. *Cf. State Farm Fire & Cas. Co. v. Palma*, 629 So.2d 830, 832 (Fla.1993) (finding a provision of the Florida Insurance Code was an "implicit

part of every insurance policy issued in Florida" because the statute addressed a subject that was present in every insurance dispute and because another provision of the Florida Insurance Code supported incorporating this statute).

Admittedly, the HMO Act does not mandate that section 641.3155 be included in HMO contracts. Nonetheless, as a number of other provisions reveal, the "prompt pay provision" serves an integral role in providing substance or structure to the rights of subscribers and the responsibilities of HMOs established in the HMO Act. For example, section 641.3154 states that an HMO "is liable for services rendered to an eligible subscriber by a provider if the provider follows the [HMO]'s authorization procedures and receives authorization," § 641.3154(2); and that if an HMO is liable for services rendered, "regardless of whether a contract exists between the [HMO] and the provider ... the subscriber is not liable for payment of fees to the provider." § 641.3154(1). Section 641.3156(1) requires HMOs to pay "any hospital-service or referral-service claim for treatment for an eligible subscriber which was authorized" by an appropriate person and in an appropriate manner. In fact, "[a] claim for treatment may not be denied" in this situation, "unless the provider provided information to the [HMO] with the willful intention to misinform the [HMO]." § 641.3156(2). The details set forth in the "prompt payment provision," section 641.3155, provide essential substance to the HMO's liability for services rendered to its subscribers.

Moreover, the HMO Act does not foreclose a common law contract action for breach of the statutorily imposed prompt payment provision. Indeed, the HMO Act contemplates actions "to enforce the terms and conditions of a[n] [HMO] contract," and it recognizes that these actions may be brought against an HMO. § 641.28 (recognizing that attorney's fees are available to the prevailing party in a civil action "brought to enforce the terms and conditions of a health maintenance organization contract," and not including HMOs in the list of exempt persons); see also § 641.282 (requiring HMOs to pay "every judgment or decree entered in any of the courts of this state against" the HMO within a specified time frame). In addition, even the statute authorizing the statewide provider and managed care organization dispute resolution program (which was enacted in 2000 to address payment disputes) does not bar civil actions to enforce the HMO contract. See § 408.7057, Fla. Stat. (2001). To the contrary, this statute forbids the resolution organization from reviewing certain claims disputes, such as those "related to interest payment[s]," and those that either fail to meet a specified jurisdictional amount or form "the basis for an action pending in state or federal court." § 408.7057(2)(b)(1), (6). Neither this statute nor the HMO Act provides that the dispute resolution program is the exclusive means of addressing these claims.

Here, the statutory language recognizing that a civil cause of action may be brought to enforce the HMO contract is particularly persuasive. HMOs enter

into these contracts “to provide an agreed-upon set of comprehensive health care services to subscribers in exchange for a prepaid [fee].” § 641.31(1). As stated earlier, section 641.3155 simply provides essential details of how the HMOs are to pay medical providers for these services. In light of this, it is difficult to see how any HMO could enter into such contracts without assuming that the “prompt payment provision” is implicit therein.

Given the above, we conclude that unless the terms of the individual HMO contract or the HMO Act properly provides otherwise, section 641.3155 may be incorporated as a term in the HMO contract for the purpose of alleging a breach of third-party beneficiary contract claim.

C. Clear Intent to Primarily and Directly Benefit

Having concluded that the “prompt pay provisions” may be incorporated into the HMO contract, we next consider whether nonparticipating providers like Westside can overcome the significant hurdle of establishing the second element of a breach of third-party contract; that is, whether the HMO contract evinces a “clear or manifest intent” to “primarily and directly benefit” the provider. *Jenne v. Church & Tower, Inc.*, 814 So.2d 522, 524 (Fla. 4th DCA 2002) (*citing Marianna Lime Prods. v. McKay*, 109 Fla. 275, 147 So. 264, 265 (1933), for the proposition that the test to determining whether a party is a third-party beneficiary to a contract is whether the contract language indicates that both parties intended that the contract “primarily and directly” benefit the third party). We find no basis to preclude nonparticipating providers from attempting to establish this element as a matter of law. As recognized by the Fourth District, Florida law recognizes medical service providers as intended beneficiaries of insurance contracts. *See Vencor Hosps. v. Blue Cross Blue Shield of R.1.*, 169 F.3d 677, 680 (11th Cir.1999) (applying Florida law to determine that medical service providers are third-party beneficiaries to a contract between a health insurer and its subscriber); *see also Orion Ins. Co. v. Magnetic Imaging Sys. 1*, 696 So.2d 475, 478 (Fla. 3d DCA 1997) (“Medical service providers ... have been recognized as third party beneficiaries of insurance contracts.”). Within the limitations of our holding, we extend this same recognition to the HMO context.

This recognition of medical services providers as third-party beneficiaries of HMO contracts is supported by statutory requirements. The HMO Act requires that the HMO contract indicate an intent to compensate nonparticipating providers for at least “emergency services and care.” See § 641.31(4), Fla. Stat. (requiring that a subscriber's contract “clearly state all of the services to which a subscriber is entitled under the contract and ... where and in what manner the comprehensive health care services may be obtained”); § 641.513(3)(a) (requiring HMOs to “compensate the provider for emergency

services and care"). The Act also prohibits an HMO from waiving this benefit in the contract, and it states that contractual provisions which contradict this provision must be construed in accordance with the Act. See § 641.31(11) ("No contract shall contain any waiver of rights or benefits provided to or available to subscribers under the provisions of any law or rule applicable to health maintenance organizations."); § 641.3105(1) (contracts or portions thereof that do not comply with the HMO Act "shall be construed and applied" as if they complied). Since part of Westside's complaint alleges the right to recover compensation for emergency services and care, Westside may be able to allege and establish that the language of the contract evinces "the clear or manifest intent of the contracting parties that the contract primarily and directly benefit" *Westside. Networkip, LLC*, 922 So.2d at 358; *cf. Vencor Hospitals*, 169 F.3d at 680 (finding medical service providers were intended beneficiaries because "[i]t would be hard to imagine a more direct benefit under a contract than the receipt of large sums of money").

Furthermore, recognizing nonparticipating medical service providers as third-party beneficiaries is supported by a contract clause the HMOs referred to in their brief on appeal.[7] In applicable part, the clause states:

> For services rendered by Non–Participating Providers, Benefits are payable to the [subscriber] or other person as required by law. However, [the HMO] may pay all or a portion of any medical Benefits to the Health Care Provider on whose charge the claim is based unless the Covered Person directs otherwise in writing by the time proofs of loss are filed with [the HMO].
>
> Like the language analyzed in *Vencor Hospitals*, 169 F.3d at 680, this clause grants the HMO discretion to pay nonparticipating providers for services rendered to the HMOs' insureds.[8] In Vencor Hospitals, the Eleventh Circuit viewed this discretion as evidence that the contracting parties intended to primarily and directly benefit the medical provider. *Id*. Moreover, the differences between the clause in this case and the language cited in Vencor Hospitals do not require a different conclusion. While the clause grants insureds the authority to remove the HMOs' discretion, the HMOs do not allege that the insureds have done so in regard to any of Westside's claims. Furthermore, this excerpt also requires HMOs to pay "other person[s] as required by law," and under the HMO Act, even nonparticipating providers may be persons entitled to payment by law. See, e.g., § 641.3155(4) (recognizing that an HMO's failure to pay or deny "any claim no later than 120 days after receiving [it] ... creates an uncontestable obligation"). Therefore, contrary to the HMOs' assertion, this clause actually appears to support Westside's allegation that it is an intended

third-party beneficiary to the HMO contracts with respect to at least some of its claims.[9]

Based on the foregoing, we conclude that nonparticipating providers such as Westside are not precluded as a matter of law from alleging and establishing that the HMO contract evinces a "clear and manifest intent" to "primarily and directly benefit" them.

CONCLUSION

For the reasons explained above, we answer the certified question as rephrased in the affirmative. Accordingly, we approve the decision of the Fourth District Court of Appeal and remand this case for further proceedings.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, and QUINCE, JJ., concur.

CANTERO, J., recused.

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[1] See art. 5, § 3(b)(4), Fla. Const.

[2] In its amended complaint, Westside described itself as a professional association and alleged that its physicians provide various types of echocardiogram ("EKG") interpretations, as well as Doppler color flow interpretations, Holter twenty-four-hour interpretations, stress test physician supervision, and stress test interpretations.

[3] Although Westside's count for breach of third-party beneficiary contract does not specifically mention section 641.3155, this count incorporated Westside's general allegations concerning the prompt pay provision of section 641.3155, alleging that the HMOs failed to make payment or contest payment within forty-five days. Westside specifically alleged violations of section 641.3155 as well as section 627.613, Florida Statutes (2001), in the other two counts of its amended complaint. Section 627.613 provides time periods in which health insurers must pay claims for medical services. It imposes requirements similar to section 641.3155; however, HMOs with a valid certificate of authority are excluded from the provisions of the Florida Insurance Code, unless expressly stated otherwise. See §§ 641.201, 641.30(2), Fla. Stat.

[4] In essence, a "clean claim" is defined in section 641.3155(1), Florida Statutes (2001), as a claim submitted without any defect or impropriety and with the proper substantiating paperwork. This term does not appear in the current version of section 641.3155, as the statute now defines a "claim" as the appropriate paper or electronic billing instrument. § 641.3155(1), Fla. Stat. (2005).

[5] Section 641.3155 has been amended numerous times since Westside filed its complaint in 2001. We do not decide what effect, if any, these amendments may have on a party's ability to establish the required elements of a breach of third-party beneficiary contract in its case. However, none of these amendments affect the holding that medical service providers, in general, may bring this cause of action based on an alleged violation of the prompt pay provision.

[6] For the purpose of this appeal, we do not determine whether Westside's complaint sufficiently pled each of the elements required to state this cause of action. *See Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028, 1031–32 (Fla. 4th DCA 1994) (providing the elements that must be pleaded to state a cause of action for breach of third-party beneficiary contract and granting the plaintiff an opportunity to amend its complaint to explicitly allege the primary and direct intent element); *see also Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d 100, 103 (Fla. 4th DCA 1969) ("[1]t behooves one seeking to establish a cause of action as a third party beneficiary to sufficiently allege the terms and provisions of the contract which he asserts was made for his benefit. Failure to do so may result in dismissal of the cause...."). We assume, arguendo, that Westside has stated a cause of action and recognize that the trial court may address this issue on remand.

[7] See Initial Br. of Foundation Health Plan at 5; Amicus Br. of Florida Association of Health Plans at 16.

[8] The contract language evaluated in *Vencor Hospitals* stated that "[b]enefit payments may be paid to the doctor, hospital or to [the insured] directly at our discretion." 169 F.3d at 680.

[9] To the extent other clauses in the individual HMO contracts evince a contrary intent, this is a determination we leave to the trial court.

Note

The authors have identified this as a case of implied-in-fact term of condition. This provides a solid opportunity to apply things learned in Chapters 17-19. Add to that review of statutory interpretation from Chapters 14-15 and the intent element of third-party beneficiary law from Chapter 21.

2. Contractor/Sub-Contractor Special Issues

Another area of law with major third-party-beneficiary and assignment/delegation issues is construction law. Every contract between two parties will always have direct or at least incidental effects on every other party somehow contractually linked to the project.

A. Subrogation Issues

Subrogation may either be equitable or legal. The idea behind subrogation is to ensure that the proper party receives payment, or damages. Subrogation clauses are common in the insurance industry. For example, if a tortfeasor is required to pay the harmed individual who has already been paid by her own insurance company for things including lost wages and medical expenses, the money owed by the tortfeasor should go to the insurance company who already paid by way of subrogation, at least in part. Because subrogation is an important contractual operation, it merits brief treatment, and discussing it in the context of construction contracts is a good fit. The following case reached the conclusion that a sub-contractor did not merit the payment of certain owed funds in subrogation. The case also addresses the issue whether damages are difficult to prove, which was addressed in Chapter X (on

limitations to the collection of damages) and is alluded to in Chapter 8 (proof of actual damages is a necessary requirement for a successful claim for contract damages). Note that the following case also makes clear who decides the existence and amount of damages in a jury trial.

GEORGE HUNT, INC. v. DORSEY YOUNG CONST. INC.

District Court of Appeal of Florida, Fourth District, 1980

385 So. 2d 732

HERSEY, Judge.

Appellant, Hunt, for purposes of this litigation is in the position of General Contractor for the construction of a two building shopping center. Appellee, as a subcontractor, was to supply concrete slabs, foundations, concrete block and masonry work for the project. Upon completion of its contract appellee was unable to obtain final payment and filed suit, whereupon a jury returned a verdict awarding appellee damages in the amount of $12,500.

Appellant's defenses were that the work was faulty and inadequate and that appellee refused to certify that its suppliers and laborers had been paid.

During the trial appellee was permitted to introduce testimony to the effect that (1) the reason for non-payment was that the General Contractor was short of funds; (2) an agent of the General Contractor agreed that $20,000 was owed to appellee; and (3) the design of certain aspects of the building rather than appellee's workmanship caused leaking and attendant problems. In each instance the testimony was hearsay, unsupported by any other competent evidence in the record and, inasmuch as these statements go to the very heart of appellant's defenses it cannot be said that admission of this testimony constituted harmless error. On the contrary, it seems most reasonable to suppose that the jury gave at least some, and perhaps considerable, credence to the theories supported by this hearsay evidence.

Accordingly, we reverse and remand for a new trial on that basis.

The cross appeal has been abandoned and is hereby dismissed, sua sponte.

Because the matter may be retried, we will comment briefly on two additional matters disclosed by our examination of the record in order to forestall repetition of what we perceive to be potentially harmful errors.

Appellant complains of appellee's failure to provide the customary affidavit and general release as a condition precedent to final payment. The trial court's refusal to give an instruction in this regard is urged as reversible

error. Obviously, appellee would not be entitled to collect for work done or materials supplied by others unless appellee has paid for or has become legally obligated to pay for that work or those materials. In addition, the contract specifically required appellee to furnish an affidavit and general release. Consequently, appellee was required both by law and by contract to provide these two documents. An instruction to that effect would be an essential aspect of the court's explanation to the jury of the law applicable to these facts.

In addition, the evidence as to the amount of damages cannot be based on speculation or conjecture, but must be proven with certainty. *Hodges v. Fries*, 34 Fla. 63, 15 So. 682 (Fla.1894). The evidence on damages in this record is somewhat sketchy, vague and inconclusive. We point out that it may not be legally sufficient to support the award of damages represented by the jury verdict notwithstanding that the jury is the sole judge of such factual issues as the amount of damages. *Sunrise Point, Inc. v. Reliance Realty, Inc.*, 371 So.2d 674 (Fla. 3rd DCA 1979). We suggest that more emphasis needs to be concentrated on this issue if the case is retried.

REVERSED AND REMANDED FOR NEW TRIAL.

LETTS, C. J., and BERANEK, J., concur.

B. Sovereign Immunity & Government Liability Pursuant to Contract Law

Since government contracting is a major area of contract law, it is important to consider a government entity's responsibility for breach of contract in light of the sovereign immunity doctrine. As an added bonus, the *Pan-Am Tobaccor Corp.* case affords an opportunity to reconsider the concept of executory contracts (a quintessential example of the kind of contracts issue that case books often do not cover with specificity but which can show up not only during practice, but on bar exams).

PAN-AM TOBACCO CORP. v. DEP'T OF CORRECTIONS

Supreme Court of Florida, 1984

471 So. 2d 4

EHRLICH, Justice.

This cause is before the Court on a question certified to be of great public importance. Pan-Am Tobacco Corp. v. State of Florida, Department of Corrections, 425 So.2d 1167 (Fla. 1st DCA 1983). We have jurisdiction.

Pan-Am Tobacco Corp. entered into a written contract with the Department of Corrections. Pan-Am was to provide vending machines in six correctional facilities. The contract provided that Department of Corrections could cancel the contract for unsatisfactory performance by Pan-Am if it gave Pan-Am sixty days' written notice and thirty days within which to correct any deficiencies. Additionally, the contract provided for liquidated damages. Department of Corrections canceled the contract on thirty days' written notice, specifying no deficiencies in Pan-Am's performance and giving no time within which to correct any deficiencies. Pan-Am brought suit on the contract and sought partial summary judgment on the issue of liability. Pan-Am's motion for partial summary judgment was denied, and Department of Corrections counter-moved for summary judgment asserting sovereign immunity as an affirmative defense. This motion for summary judgment was granted. Pan-Am appealed and the First District Court of Appeal affirmed but certified as a matter of great public importance the following question:

> WHEN A STATE AGENCY IMPROPERLY RESCINDS AN EXPRESS EXECUTORY CONTRACT WITH A PRIVATE VENDOR WHO SUFFERS A LOSS OF PROFIT AS A CONSEQUENCE, MAY THE STATE INVOKE SOVEREIGN IMMUNITY AS A BAR TO AN ACTION ON THE BREACH OF CONTRACT?

425 So.2d at 1172. We answer the question in the negative and quash the decision of the district court, remanding the cause to the trial court for further proceedings.
In Florida, sovereign immunity is the rule, rather than the exception, as evidenced by article X, section 13 of the Florida Constitution: “Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”

In section 768.28, Florida Statutes (1981), the legislature has explicitly waived sovereign immunity in tort. There is no analogous waiver in contract. Nonetheless, the legislature has, by general law, explicitly empowered various state agencies to enter into contracts. *See e.g.,* §§ 23.017, 153.62(11), 163.370, 230.22(4), 337.19(1), Fla.Stat. (1981). Additionally, it has authorized certain goals and activities which can only be achieved if state agencies have the power to contract for necessary goods and services. *See e.g.*, §§ 20.315, 945.215, Fla.Stat. (1981).

It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract. *Howard Cole & Co. v. Williams*, 157 Fla. 851, 27 So.2d 352 (1946). Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound. *Miami Coca-Cola Bottling Co. v. Orange-Crush Co.*, 291 F. 102 (D.Fla.1923), *affirmed*, 296 F. 693 (5th Cir.1924).

Respondent contends that the requirement of mutuality of remedy is satisfied by petitioner's opportunity to bring a claims bill before the legislature. This Court has recently held that subjecting oneself to the possibility of suit in a court of law is not sufficient obligation to support a contract. *Stack v. Dunn*, 444 So.2d 935 (Fla. 1984). We cannot now, in good conscience, hold that the chance to seek an act of grace from the legislature is sufficient remedy to create mutuality.

Where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless. We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.

We recognize that in so holding we recede from a line of cases holding that the state may not be sued in contract without express consent to the suit. *See, e.g., Gay v. Southern Builders*, Inc., 66 So.2d 499 (Fla.1953), *Bloxham v. Florida Central and Peninsular Railroad*, 35 Fla. 625, 17 So. 902 (1895). Nonetheless, we note that this is not the first time this Court has looked to the legislative intent in general law to find a sovereign amenable to suit. *Manatee County v. Town of Longboat Key*, 365 So.2d 143 (Fla.1978) (where the legislature clearly intended the county to participate in resolution of taxation dispute and the county ignored its statutory duty, courts had jurisdiction to fashion a remedy in equity).

We would also emphasize that our holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter. Accordingly, the decision of the district court is quashed and this cause is remanded for further proceedings.

It is so ordered.

C. Liability for Latent Defense in Construction Project Plans & Specifications: The *Spearin* Doctrine

Major construction projects typically involve a multitude of contracts, and a special body of contract law develops within the industry as courts (and legislatures) determine issues specific to that industry. This is true of other commercial disputes, including insurance law. Law schools frequently offer electives courses in subjects such as insurance law. Maritime law and the unique contractual rules that this body of law has developed is another

example, and was alluded to if not addressed in Chapter 19. To the extent that the Florida Bar Examiners could test on a somewhat obscure topic of Florida law, we include the *Phillips & Jordan, Inc.* case that follows. Contracting with a government entity is another area that has developed a special body of contract-based rules. Anyone practicing in a state other than Florida should look for a similar rule or practice on other jurisdictions.

PHILLIPS & JORDAN, INC. v. STATE DEPT. OF TRANSP.

District Court of Appeal of Florida, First District, 1992

602 So. 2d 1310

PER CURIAM.

Appellant Phillips and Jordan (P & J) and appellee Florida Department of Transportation (DOT) entered into a contract whereby P & J was to construct a fence along an estimated 71 miles of Interstate 1–95 in Brevard, County. The project plans also provided for the clearing and grubbing of a ten-foot-wide strip within which the fence was to be located. The standard bid form used by P & J to bid the contract specified that "all work is to be done in accordance with the plans, specifications, and special provisions of the State of Florida Department of Transportation." The parties stipulated to the following pertinent facts: (1) the contract included provisions for clearing and grubbing work; (2) bidders were required to submit a unit price per acre for the clearing and grubbing; (3) the approximate amount of clearing and grubbing work was 179 acres; (4) the 179 acre estimate was derived by multiplying 10 feet times the estimated length of the project and converting the resulting square footage into acreage; (5) P & J submitted the lowest bid at $4,200.00 per acre for the clearing and grubbing work; (6) P & J satisfactorily completed the project; and (7) the contract did not specify the type or size of equipment to be used for the clearing and grubbing work.

Upon completion of the project, P & J hired a surveyor to verify the amount of fence erected and the number of acres cleared and grubbed. P & J then requested payment for the actual work performed by it at the unit prices bid. The actual length of the fence erected was slightly less than the project estimate. Accordingly, P & J was paid based on the price per unit. With respect to the clearing and grubbing work, P & J claimed that the density of the growth to be cleared made it necessary at times to use heavy duty clearing equipment with minimum twelve-foot-wide cutting blades. As a result, the area actually cleared, in some locations, exceeded the ten-foot width specified by the project plans. At completion of the project, according to P & J's survey, the area actually cleared and grubbed measured 216.69 acres. DOT, however, refused to pay P & J for the acreage actually cleared. P & J

filed suit claiming entitlement to payment for the work actually performed under the contract.

Appellee DOT filed a motion for summary judgment. A hearing on DOT's motion was held on April 17, 1991. The trial court considered the pleadings, affidavits, depositions and arguments of the parties before granting DOT's motion for summary judgment. Among the pertinent and undisputed facts adduced were the following. Before submitting its bid on the project, P & J sent its vice president, Benjamin R. Turner and assistant project manager, Kenneth A. Campbell, to view the project site by helicopter. Turner admitted that his observation of the site indicated that heavy equipment would be needed for portions of the clearing work because of the density of the growth to be cleared, and in order to achieve the minimum daily production necessary to meet the construction schedule. Turner also admitted that the equipment required for the job was equipped with minimum width blades of twelve feet, and was most likely owned by P & J prior to entering into the contract. In his deposition testimony, Turner stated although he had had discussions with DOT personnel regarding the clearing of an area in excess of ten feet wide, he could not recall if he was led to believe that he would be compensated for such clearing.

Mr. Campbell's deposition testimony indicates that after informing DOT officials that it was necessary to clear more than a ten-foot width at times, the officials permitted such excessive clearing with instructions to keep the clearing to a minimum. No mention of additional compensation was made. Thereafter, Campbell had another meeting with DOT officials wherein he asked for additional compensation for areas cleared in excess of the ten-foot width. DOT officials informed Campbell that they did not agree with his interpretation of the contract under which he claimed payment due for the actual area cleared, rather than for a ten-foot wide area. Thus, DOT officials told Campbell that there would be no extra compensation for the area cleared in excess of ten feet. Campbell conceded that no DOT employee actually requested or directed him to clear an area in excess of ten feet wide.

On appeal, appellant relies first on the doctrine of constructibility to claim that the project could not be performed according to the plans and specifications provided, and that appellant is therefore entitled to compensation for the area actually cleared. Appellant also claims that the contract expressly provides for compensation for the area actually cleared. We find appellant's arguments unpersuasive for the following reasons.

The doctrine of constructibility (or the Spearin[1] doctrine) holds a hiring party liable for unanticipated construction costs incurred due to a latent defect in the project plans or specifications. However, we find the constructibility doctrine to be inapplicable to the facts of the case at bar. Even assuming that the clearing and grubbing portion of the contract was inconstructible as

planned insofar as the equipment required was a minimum of twelve feet in width, such was not a latent defect in the job specifications. Appellant P & J had availed itself of the opportunity to inspect the job site, knew of the site conditions, knew of the type of equipment it would subsequently use at the site, and knew that its equipment of choice would clear an area in excess of ten feet in width. P & J submitted its bid in contemplation of these facts, and cannot now claim the existence of a latent defect in the job specifications such as would warrant the application of the implied warranty of constructibility.[2]

We are likewise unpersuaded by appellant's argument that it is entitled to payment for the area actually cleared because the contract is a unit price contract predicated on payment for work actually performed. More precisely, the instant contract contemplates payment for work actually performed within the parameters of the job specifications. To be sure, a unit price contract provides for payment of the actual amount of work done or material supplied where the precise amounts needed are not known at the inception of the project. In the instant case, however, the only variable contemplated by the job specifications was the length of the area to be cleared and grubbed, not the width of such area. Furthermore, appellant was possessed of a contractual means to assert its claim for payment for work performed outside the specified ten-foot wide area. Appellant could have sought written authorization for payment for such work, in effect, a reformation of the contract, under a contractual provision providing for such a reformation where it appears necessary. In fact, under the terms of the contract, appellant is precluded from seeking payment for work performed outside the contractual specifications without first seeking a written reformation of the contract. Therefore, appellant's claim is barred by the express terms of the contract.

The material facts necessary to resolution of the instant case are not disputed. The trial court correctly granted summary final judgment in favor of appellee DOT.

AFFIRMED.

SHIVERS, MINER and WOLF, JJ., concur.

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[1] *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918).

[2] Furthermore, we do not construe the trial court's order to bar appellant's claim under the doctrine of sovereign immunity because it is based on an implied covenant of the contract rather than an express term of the contract. Such a view would be erroneous. See Champagne–Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988). Rather, we construe the trial court's order to bar appellant's claim because it is outside both the express and implied conditions of the contract.

D. Government Liability (And Sovereign Immunity) in Torts for Their Contractors' Activities: The *Modlin* Doctrine

This is not a course on torts, but the issue of a waiver of government immunity often involves the law of contract as well as the law of tort. Further, there is a kind of *agency* relationship between a municipal entity and its hired contractors – which stems from the contractual relationship. Additionally, this involves a constitutional issue – sovereign immunity and its waiver by statute. The interconnectedness begs for treatment at this point in Chapter 22. As an aside, this three-for-the-price-of-one conglomeration of issues fits the style of the Florida Bar Examiners for the Florida law essays. Finally, the case also demonstrates again the Florida Supreme Court's role of reconciling differing treatment of legal issues between different Florida District Courts of Appeal. Again, anyone practicing in a state other than Florida should look for a similar rule or practice on other jurisdictions

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COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY

Supreme Court of Florida, 1979

371 So. 2d 1010

SUNDBERG, Justice.

It is our task today to determine the scope of the waiver of sovereign immunity resulting from the enactment of chapter 73-313, as amended by chapter 74-235, Laws of Florida, section 768.28, Florida Statutes (1975).[1] The issue reaches us by writ of certiorari from two separate decisions of the District Court of Appeal, Third District, which have been consolidated for review by this Court. The first decision, *Commercial Carrier Corporation v. Indian River County*,[2] is alleged to be in conflict with *Gordon v. City of West Palm Beach*.[3] The second, *Cheney v. Dade County*,[4] was certified by the district court as involving a question of great public interest. Jurisdiction vests in this Court pursuant to article 5, section 3(b)(3), Florida Constitution.

* * *

Respondent moved to dismiss the complaint on the following grounds: (1) the complaint failed to state a cause of action because the doctrine of sovereign immunity precludes recovery against respondent; (2) petitioner failed to allege knowledge on the part of the respondent as to the malfunctioning of the traffic light; (3) petitioner failed to allege how sovereign immunity had been waived; and (4) petitioner failed to allege compliance with the notice provisions of section 768.28(6), supra. The trial court granted respondent's motion and dismissed the third-party complaint with prejudice. The District Court of Appeal, Third District, affirmed, holding that no cause of action existed for respondent's allegedly negligent act.

The operative portion of section 768.28 reads:

> (1) In accordance with section 13, Art. X, state constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

A limitation upon the liability of the state and its agencies and subdivisions is expressed in section 768.28(5):

> The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state arising out of the same incident or occurrence, exceeds the sum of $100,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the legislature, but may be paid in part or in whole only by further act of the legislature.

By definition, “state agencies or subdivisions” include “the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.”[5] As a condition precedent to instituting an action on a claim against the state or one of its agencies or subdivisions, the claimant is required to give written notice to the appropriate agency or agencies[6] and the action must be commenced within four years after such claim accrues.[7]

The district court in *Commercial Carrier Corporation, supra*, asserting that it was unnecessary to discuss the implications of section 768.28, held that it is

not actionable negligence for a governmental authority to fail to maintain a traffic control device at a given time and place. *Gordon v. City of West Palm Beach*, 321 So.2d 78 (Fla. 4th DCA 1975), among other cases, was cited as authority for the holding. In *Cheney, supra*, the same court applied the holding in *Modlin v. City of Miami Beach*, 201 So.2d 70 (Fla. 1967), and concluded that section 768.28 "does not create a liability in the State where the act complained of does not give rise to liability in the agent committing the act, because the duty claimed to be violated is a duty owed to the citizens of the state in general and is not a duty owed to a particular person or persons." 353 So.2d at 626. By importing a concept of municipal immunity from tort liability the court reasoned that no cause of action existed for the alleged wrong and, therefore, section 768.28 had no application because it was not intended to create a cause of action where none existed at common law prior to its enactment.

Respondents and amici support the decisions of the district court on several grounds. Apart from the reasoning of the court below, they maintain (1) that section 768.28 was intended to make the tort liability of the state and its political subdivisions coextensive, that liability to be measured by the scope of liability of municipal corporations at the time of enactment of the statute; (2) that there can be no tort liability under the act for essentially governmental functions because "private persons" do not perform such functions; and (3) that the acts or omissions complained of are discretionary in nature, thereby immunizing the governmental authority from liability.

Petitioners and other amici assert a much broader scope of operation for section 768.28, ranging from unlimited liability in tort for all acts or omissions by government to liability at least for those governmental acts and omissions at the operational level which involve no discretion. Each submits that the conduct complained of in the instant cases supports a cause of action even under a limited view of the statute.

While we are not prepared to embrace the notion that all acts or omissions by governmental authorities will subject them to liability in tort under the statute, nevertheless we conclude that the district court has ascribed much too narrow a field of operation to section 768.28. For the reasons articulated below we disapprove the decisions under review.

First, we believe it to be circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivisions where the duty breached is said to be owed to the public at large but not to any particular person. This is the "general duty"-" special duty" dichotomy emanating from *Modlin, supra*. By less kind commentators, it has been characterized as a theory which results in a duty to none where there is a duty to all. Regardless, it is clear that the *Modlin* doctrine is a function of municipal sovereign immunity and not a traditional negligence

concept which has meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity. If this be so, does the *Modlin* doctrine survive notwithstanding the enactment of section 768.28? We think not.

The state of the law concerning municipal sovereign immunity on the date of enactment of section 768.28 was clearly enunciated in *Gordon v. City of West Palm Beach*, *supra*:

1) as to those municipal activities which fall in the category of proprietary functions a municipality has the same tort liability as a private corporation;

2) as to those activities which fall in the category of governmental functions ". . . a municipality is liable in tort, under the doctrine of respondent superior, Only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation." *City of Tampa v. Davis*, Fla.App.1969, 226 So.2d 450;

3) as to those activities which fall in the category of judicial, quasi judicial, legislative, and quasi legislative functions, a municipality remains immune. *Hargrove v. Town of Cocoa Beach, supra* (96 So.2d 130) (Fla. 1957); *Modlin v. City of Miami Beach, supra*.

321 So.2d at 80 (emphasis in original). This patchwork quilt of analysis resulted from a felt need to ameliorate the sometimes harsh results of applying the doctrine of sovereign immunity to activities of municipal corporations. Commencing with *Kaufman v. City of Tallahassee*, 84 Fla. 634, 94 So. 697 (1922), which authorized recovery for a pedestrian injured by a municipally owned and operated fire truck, this Court distinguished between the city's governmental functions and its "business, commercial, proprietary" concerns. Thus was the functional test created. If the function was proprietary the city was treated as any nonpublic entity performing a like-type act. If the function was perceived to be purely governmental, however, immunity attached. *See Woods v. City of Palatka*, 63 So.2d 636 (Fla.1953); *City of Miami v. Oates*, 152 Fla. 21, 10 So.2d 721 (1942); *Peavey v. City of Miami*, 146 Fla. 629, 1 So.2d 614 (1941); *Rogers v. City of Miami Springs*, 231 So.2d 257 (Fla. 3d DCA 1970).

A further refinement of the doctrine denied immunity even for governmental functions where the duty breached by a member of the executive branch was owed specifically to the individual plaintiff as opposed to the public generally. *See Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla.1957); *Florida First National Bank v. City of Jacksonville*, 310 So.2d 19 (Fla. 1st DCA 1975), *Cert. discharged*, 339 So.2d 632 (Fla.1976); *City of Tampa v. Davis*, 226 So.2d 450 (Fla. 2d DCA 1969); *City of Hialeah v. Hutchins*, 166 So.2d 607 (Fla. 3d DCA

1964*); Simpson v. City of Miami Beach*, 155 So.2d 829 (Fla. 3d DCA 1963); *Thompson v. City of Jacksonville*, 130 So.2d 105 (Fla. 1st DCA 1961). Immunity was always deemed to have existed for legislative, quasi-legislative, judicial and quasi-judicial acts of municipalities. *Hargrove v. Town of Cocoa Beach, supra*. Although the opinion in *Hargrove* seemed to signal a substantial relaxation in the scope of sovereign immunity, *Modlin, supra*, laid to rest any notion that the reach of the opinion extended beyond situations where a "special duty" to the plaintiff was found to exist.

Predicating liability upon the "governmental-proprietary" and "special duty-general duty" analyses has drawn severe criticism from numerous courts and commentators.[8] Consequently, we cannot attribute to the legislature the intent to have codified the rules of municipal sovereign immunity through enactment of section 768.28, Florida Statutes (1975). Even if we were disposed toward respondents' argument, a plain reading of the statute would deny such a construction. Municipalities are unequivocally included within the definition of "state agencies or subdivisions." s 768.28(2), Fla.Stat. (1975). Were it the intent of the legislature merely to make the law of municipal sovereign immunity applicable to the state, its agencies and political subdivisions, there would have been no need to include municipalities within the operation of the statute. Consequently, we conclude that *Modlin* and its ancestry and progeny have no continuing vitality subsequent to the effective date of section 768.28.

What, then, is the scope of waiver contemplated by section 768.28? Respondents assert that all governmental functions are exempt from waiver by the wording of the statute itself. They point to the language contained in section 768.28(1) and (5):

> Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, If a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

§ 768.28(1), Fla.Stat. (1975) (emphasis supplied).

> The state and its agencies and subdivisions shall be liable for tort claims In the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. . . .

§ 768.28(5), Fla.Stat. (1975) (emphasis supplied). They argue that since private individuals do not perform governmental functions, there is no waiver where any governmental function is involved. However, this argument has been rejected by the United States Supreme Court in construing the Federal Tort Claims Act. In *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), that Court had occasion to construe the then current version of the federal act, which was almost identical to the Florida act with respect to the language here under consideration.[9] In that case, a tug owner sought recovery under the federal act for damages alleged to have been caused by the negligence of the Coast Guard in the operation of a lighthouse light. To the same argument herein espoused the Court responded:

> But the Government contends that the language of § 2674 (and the implications of § 2680) imposing liability "in the same manner and to the same extent as a private individual under like circumstances . . ." must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of "uniquely governmental functions." The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good Samaritan" task in a careful manner.

350 U.S. at 64-65, 76 S.Ct. at 124. In rejecting the government's assertion that it was immune from suit the Court also disavowed the notion that the Federal Tort Claims Act incorporated the concept of municipal tort liability:

> Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "non-governmental"-"governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-

> defeating by covertly embedding the casuistries of municipal liability for torts.

350 U.S. at 65, 76 S.Ct. at 124-125 (footnote omitted). For the same reasons articulated above, we refuse to place such a gloss on our waiver statute. To do so would be to essentially emasculate the act and the salutary purpose it was intended to serve.

Respondents' final argument poses a more difficult problem. They maintain that the acts complained of involve the exercise of discretion or judgment by governmental officials or employees and, therefore, the performance of such acts or omissions are exempt from operation of the statute. Petitioners counter with the assertion that unlike the Federal Tort Claims Act, which contains an express exception for discretionary acts,[10] no exception for such acts is expressed in the Florida statute. The implication is that our legislature had available to it the federal act, as is apparent from certain language borrowed from that legislation, and it made the conscious choice not to provide an exception for discretionary acts. While it cannot be denied that our statute contains no such exception, it does not necessarily follow that all acts or omissions by governmental officials or employees may form the basis for recovery against the governmental authority involved. The absence of a “discretionary exception” in their waiver statute has not precluded several jurisdictions from holding that certain areas of governmental conduct remain immune from scrutiny by judge or jury as to the wisdom of that conduct.[11]

The Court of Appeals of New York in *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960), construed that state's broad waiver of immunity statute so as not to authorize an action by an injured pedestrian who alleged negligence on the part of the City of Buffalo in providing too short a “clearance interval” for the traffic signal lights at the intersection where the injury occurred. New York's statute contained no “discretionary exception”; nonetheless the court analyzed two lines of authority predating the waiver statute and concluded that certain judgmental decisions by governmental officials may not be the subject of tort liability. One line of cases rested immunity on the policy of maintaining the administration of municipal affairs in the hands of state or municipal executive officers as against the incursion of courts and juries, while the other rested the immunity on the sovereign character of the state or municipality in the performance of its governmental functions. While the latter cases lost their legal force and effect with the passage of the New York Court of Claims Act, the former retained their vitality because they were not predicated simply upon the premise that the sovereign can do no wrong. They were grounded instead upon a concept of separation of powers which will not permit the substitution of the decision by a judge or

jury for the decision of a governmental body as to the reasonableness of planning activity conducted by that body. As articulated by Judge Fuld:

> To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that “the king can do no wrong”, serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.

7 N.Y.2d at 586, 200 N.Y.S.2d at 413, 167 N.E.2d at 66.

The state of Washington has also implied a discretionary function exception in its waiver of immunity statute in the absence of an express exception. The case of *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965), involved a claim against the state by plaintiffs whose buildings had been destroyed by fire set by an escapee from a state-maintained juvenile correction facility. The allegations of fault on the part of the state related to (i) the maintenance of a certain “open program” (as opposed to close security) at the correction facility; (ii) assignment of the escapee to the “open program”; (iii) assignment of the escapee to a particular type work detail at the facility; and (iv) failure to timely notify local law enforcement agencies of the escape. The state responded that the decisions, acts or omissions complained of involved the exercise of administrative judgment and discretion and could not be properly characterized as tortious conduct. The court recognized that by enactment of the Washington waiver statute the legislature intended to abolish on a broad basis the doctrine of sovereign tort immunity. However, it was concluded that the statute was not as broad as it might have been written. Noting the absence of the varied exceptions found in the Federal Tort Claims Act, the court observed nonetheless that state government was liable for damages only when such damages arise out of “ ‘tortious conduct to the same extent as if it were a private person or corporation.’ ” 407 P.2d at 444. It was judged necessary to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins. *Id*. The court recognized that the legislative, judicial and purely executive processes of government, including discretionary acts and decisions within the framework of such processes, cannot and should not be characterized as tortious. Public policy and maintenance of the integrity of our system of government necessitate this immunity, however unwise, unpopular, mistaken or neglectful a particular decision or act might be. The rationale for this conclusion was stated thus:

> The reason most frequently assigned is that in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability, or, as stated by one writer "Liability cannot be imposed when condemnation of the acts or omissions relied upon Necessarily brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives." Peck, The Federal Tort Claims Act, 31 WASH.L.REV. 207 (1956).

Id. at 444 (emphasis in original). After reviewing the characterizations utilized by a number of courts in attempting to ferret out those acts or functions which remain immune from tort liability, the court proposed the following preliminary test:

Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Id. at 445. Through application of this test the first two grounds asserted for liability were determined to involve acts for which the state was immune. Although the remaining two bases for liability were not adjudged to involve immune conduct, the state was held not to be liable on standard tort principles of lack of foreseeability and causation.

Ohio has reached the same result under its waiver statute, notwithstanding the absence of an express "discretionary" exception. *See Harris v. State*, 48 Ohio Misc. 27, 358 N.E.2d 639 (1976).

This concept of exemption from tort liability for the exercise of certain governmental functions bottomed on the concept of separation of powers has found expression in at least one prior decision of this Court. In *Wong v. City of Miami*, 237 So.2d 132 (Fla. 1970), merchants whose property was damaged in connection with a rally which culminated in civil disorder and plundering sued the city and Dade County for negligent handling of the rally. At the request of merchants bordering the rally area, the city increased police protection in the area. Subsequently, on order of the mayor confirmed by an order of the county sheriff, the increased police forces were removed. After the forces were removed the rally got out of hand and participants damaged the neighboring stores in excess of $100,000 before police control could be reestablished.

The plaintiffs filed suit predicated on the theory that removal of the officers was a careless and negligent act. The city responded with a motion to dismiss on the grounds that (i) no sufficient connection was alleged between withdrawal of the officers and the injuries complained of; (ii) police protection was a duty owed the public generally which would not inure to the benefit of particular private citizens; and (iii) Removal of officers was within the realm of governmental discretion. The county moved for summary judgment. The trial court granted the motions and dismissed the complaint with prejudice. The District Court of Appeal, Third District, affirmed with one judge dissenting. The dissent, relying on *Hargrove, supra*, concluded that a special duty was demonstrated. The majority, also applying Hargrove, drew the opposite conclusion and cited for analogy *Steinhardt v. Town of North Bay Village*, 132 So.2d 764 (Fla. 3d DCA 1961), which dealt with the negligent provision of fire protection.

It is important to note that while this Court discharged the writ of certiorari it took issue with the aspect of the majority decision which impliedly conceded negligence on the part of the city but found it not to be actionable because of sovereign immunity:

> While sovereign immunity is a salient issue here, we ought not lose sight of the fact that inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers. In the Report of the National Advisory Commission on Civil Disorders, issued pursuant to Executive Order 11365 in 1967, the point was frequently made that police visibility was often an operative factor in the raising of tensions, and that withdrawal from an area could be a highly useful tactical tool for the relaxing of tensions in certain situations. The sovereign authorities ought to be left free to

> exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence. Here officials thought it best to withdraw their officers. Who can say whether or not the damage sustained by petitioners would have been more widespread if the officers had stayed, and because of a resulting confrontation, the situation had escalated with greater violence than could have been controlled with the resources immediately at hand? If that had been the case, couldn't petitioners allege just as well that that (emphasis theirs) course of action was negligent?

237 So.2d at 134 (emphasis supplied). This was a clear recognition by the Court of a principle of law apart from the ancient doctrine of immunity as a simple aspect of sovereignty. It represents the distinct principle of law alluded to by Judge Fuld in *Weiss v. Fote, supra*, which makes not actionable in tort certain judgmental decisions of governmental authorities which are inherent in the act of governing.

Hence, we are persuaded by these authorities that even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability. Like the Washington court, we recognize that the identification of these functions will in many instances be difficult. The temptation is strong to fall back on semantic labels for ease of application and seeming certainty. However, we eschew this temptation, as it surely will result in a return to the overly structured and often misleading analysis which persists in the law of municipal sovereign immunity.

A semantic test for identification of discretionary governmental functions which should continue to enjoy immunity was attempted and then disavowed in California, whose statute contains a discretionary exception. For a time, the lower appellate courts in California labored unsuccessfully to develop a dictionary definition of “discretion” which established liability for minor discretionary actions but preserved immunity for high-level decisions.[12] Disavowal of this definitional approach came in *Johnson v. State*, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), where the California Supreme Court recognized that all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion in the manner of their performance. Consequently, that court opted for an analysis predicated on policy considerations and adopted a test articulated in *Lipman v. Brisbane Elementary School District*, 55 Cal.2d 224, 11 Cal.Rptr. 97, 99, 359 P.2d 465, 467 (1961):

Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding

whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which government liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.

As a tool for identifying discretionary acts under the Federal Tort Claims Act the federal courts, commencing with the decision in *Dalehite v. United States*, *supra*, have developed an analysis which distinguishes between decisions made at the "planning level" and those at the "operational level." Planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy.[13] Johnson v. State, supra, likewise employed the planning-operational distinction as an aid to isolate those discretionary functions of government which should be immune from tort liability. The Johnson court was not unmindful of the deficiencies inherent in such an analysis, but perceived that the lack of certainty and predictability of such approach was overridden by its emphasis on the considerations behind the rule of governmental immunity:

> We recognize that this interpretation of the term "discretionary" presents some difficulties. For example, problems arise in attempting to translate this concern for the court's role in the governmental structure into an applicable touchstone for decision. Our proposed distinction, sometimes described as that between the "planning" and "operational" levels of decision-making (*cf. Dalehite v. United States, supra*, 346 U.S. 15, 35-36, 73 S.Ct. 956, (97 L.Ed. 1427)), however, offers some basic guideposts, although it certainly presents no panacea. Admittedly, our interpretation will necessitate delicate decisions; the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to reexamine it. Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.

73 Cal.Rptr. at 248-249, 447 P.2d at 360-61 (footnote omitted).

Alaska and Hawaii have adopted a similar construction of discretionary function immunity under their respective waiver statutes. *State v. Abbott*, 498 P.2d 712 (Alaska 1972); *Rogers v. State*, 51 Hawaii. 293, 459 P.2d 378 (1969).

The Utah Supreme Court cited Johnson in a case with substantially the same facts as Rogers and reached a similar conclusion. *Carroll v. State*, 27 Utah 2d 384, 496 P.2d 888 (1972). Minnesota has held that deployment of police and fire departments during riots falls within the discretionary function exception. *Silver v. City of Minneapolis*, 284 Minn. 266, 170 N.W.2d 206 (1969).

So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance. In order to identify those functions, we adopt the analysis of Johnson v. State, supra, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary test iterated in *Evangelical United Brethren Church v. State, supra*, as a useful tool for analysis.

Recurring, then, to the instant cases. It is apparent that the maintenance of a traffic signal light which is in place[14] does not fall within that category of governmental activity which involves broad policy or planning decisions. This is operational level activity. So too is the proper Maintenance of a traffic sign at an intersection and the proper Maintenance of the painted letters "STOP" on the pavement of a highway.[15] As asserted by Commercial Carrier Corporation in its brief (main brief at 17), the gravamen of that petitioner's complaint is the failure of the county and Department of Transportation to maintain existing traffic control devices which had been in place. We do not deal in these cases with the issue of whether or not, or what type of, traffic control devices should have been installed at the particular intersections. Accordingly, we express no opinion with respect to whether liability could be imposed on the governmental bodies involved for failure in the first instance to place traffic control devices at the intersections.

We must also address two additional procedural issues raised in these consolidated cases. The first is whether section 768.28 contemplates waiver of immunity for actions based on contribution or indemnity. The second deals with the notice provisions of the statute.

Regarding the first issue, respondents maintain that waiver is limited to direct tort actions against the state and its agencies and subdivisions. However, this assertion has been clearly rejected by the federal courts in interpreting the Federal Tort Claims Act. *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951); *Certain Underwriters at Lloyd's v. United States*, 511 F.2d 159 (5th Cir. 1975). Like the federal courts, we find no logical reason to limit application of our waiver statute to direct actions. Actions for contribution or indemnity grounded on the tortious conduct of the

state or its agencies and subdivisions are no less tort claims for purposes of section 768.28 than direct actions. *Cf. Village of El Portal v. City of Miami Shores*, Florida, 362 So.2d 275 (Fla.1978).

As to the second issue, we agree with the respondents that the third-party complaints were deficient from the standpoint of properly alleging compliance with the notice provisions of section 768.28(6), Florida Statutes (1975). Compliance with that subsection of the statute is clearly a condition precedent to maintaining a suit. *Crumbley v. City of Jacksonville*, 102 Fla. 408, 135 So. 885 (1931); *High v. City of Jacksonville*, 51 Fla. 207, 40 So. 1032 (1906). Consequently, the performance of the condition should be alleged in the complaint in accordance with Florida Rule of Civil Procedure 1.120(c). In *Cheney*, there was no allegation of statutory compliance. In *Commercial Carrier Corporation*, it was alleged that proper notice had been given to both governmental defendants, but there was no allegation that timely written notice was given to the Department of Insurance as is also required by section 768.28(6). Nonetheless, failure of the pleadings in this regard does not call for dismissal with prejudice. In view of our holdings herein, the third-party complaint in each case should have been dismissed with leave to amend.

Accordingly, the petitions for writ of certiorari are granted, the decisions of the District Court of Appeal, Third District, are quashed, and these consolidated cases are remanded to the district court with directions to remand to the trial court for proceedings not inconsistent with this decision.

It is so ordered.

ENGLAND, C. J., and ADKINS, HATCHETT and ALDERMAN, JJ., concur.

OVERTON, J., dissents with an opinion, with which BOYD, J., concurs.

OVERTON, Justice, dissenting.

1 dissent. By allowing a negligence action against the state and county for failure to properly maintain a public roadway, the majority opinion, in my view, contravenes the legislative intent and purpose of section 768.28, Florida Statutes (1975). The majority accepts the legal principle that there can be no action against the state or county unless the legislature has authorized it. Although politically this type of legal action against the state may be desirable, it is not permissible under the provisions of the statute adopted by the legislature.

The subject statute expressly provides that it applies only “under circumstances in which the state or such agency or subdivision, If a private person, would be liable to the claimant . . .” section 768.28(1) (emphasis added), and “The state and its agencies and subdivisions shall be liable for

tort claims in the same manner and to the same extent As a private individual under like circumstances . . . .” section 768.28(5) (emphasis added).

The effect of the majority opinion is to allow negligence claims against the state and counties for failure to properly maintain miles of interstate and primary state and county roads. 1 am unable to accept the premise required by the majority that the failure to timely fix a traffic light, the failure to put a stop sign in place, and the failure to repaint “STOP” on the pavement of a highway are “circumstances” for which a “private person” would be liable. Common sense dictates that the maintenance of thousands of miles of public roadways is not the kind of activity which private individuals engage in, but is uniquely governmental in nature.

Without question, this is a perplexing and inconsistent area of the law, not only in this jurisdiction but in other jurisdictions in the nation as well. Illustrative are the decisions of the United States Supreme Court in *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), and *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). In Dalehite, the United States Supreme Court held that the negligence of the Coast Guard in failing to prevent a catastrophic fire by regulating the storage of a potentially explosive fertilizer and by its negligent failure to properly fight the fire after it had started was outside the parameters of the federal tort claims act. On the other hand, in *Indian Towing Co.*, the same Court, without receding from *Dalehite*, held that the negligence of the Coast Guard in the operation of a lighthouse was a proper action under the act. The majority accepts the reasoning of the United States Supreme Court in the latter decision and analogizes it to the facts in the instant cases. It is difficult, however, to reconcile *Indian Towing Co*. with Dalehite, and 1 would not use one as a basis for ascertaining the intent of the legislature in adopting section 768.28, Florida Statutes (1975).

The majority also rejects the argument that the use of funds for the maintenance of public roadways is a discretionary function and, therefore, immune from liability. This is, in my view, a legitimate contention. The availability of such funds is established by appropriation formulas, and discretionary decisions must be made as to the maintenance projects which can be accomplished with available funds. The majority opinion in effect says a judge or jury can override that discretionary decision.

For the reasons expressed, 1 would affirm the district court's decisions because 1 discern no legislative intent to allow recovery under section 768.28, Florida Statutes (1975), for the negligent maintenance of public roadways.

BOYD, J., concurs.

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[1] We do not deal here with personal immunity of individual officers acting in their official capacity. This distinct principle of law is explored in cases such as *McNayr v. Kelly*, 184 So.2d 428 (Fla. 1966), and *Rivello v. Cooper City*, 322 So.2d 602 (Fla. 4th DCA 1975).

[2] 342 So.2d 1047 (Fla. 3d DCA 1977).

[3] 321 So.2d 78 (Fla. 4th DCA 1975).

[4] 353 So.2d 623 (Fla. 3d DCA 1977).

[5] § 768.28(2), Fla.Stat. (1975).

[6] § 768.28(6), Fla.Stat. (1975).

[7] § 768.28(12), Fla.Stat. (1975).

[8] *E.g., Elgin v. District of Columbia*, 119 U.S.App.D.C. 116, 337 F.2d 152 (1964); K. Davis, Administrative Law of the Seventies s 25.07 (1976); W. Prosser, Law of Torts s 131 (1976); 43 Mo.L.Rev. 387, 388 (1978); 57 Ore.L.Rev. 478, 479 n.6.

[9] The relevant provisions of the Federal Tort Claims Act were 28 U.S.C. §§ 1346(b) and 2674 (1951):

> s 1346(b) . . . (T)he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

s 2674. The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

[10] 28 U.S.C. s 2680(a) (1975).

[11] "Of course, it is not a tort for government to govern . . . ." *Dalehite v. United States*, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427 (1953) (Jackson, J, dissenting).

[12] See Note, The Discretionary Function Exception to Government Tort Liability, 61 MARQ.L.REV. 163, 168 (1977).

[13] Although the Dalehite opinion suggested that implementation of policy is also immune, this premise has never been adopted by the state courts and has been limited by subsequent federal decisions. *See* Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act, 57 GEO.L.J. 81 (1968); 61 Marq.L.Rev. at 170.

[14] *Cheney, supra*.

[15] *Commercial Carrier Corporation, supra*.

Note

Property courses sometimes cover the difference between assuming a mortgage and taking real property subject to a mortgage. This is a small but testable item for which at least brief treatment is in order. Contracts are involved, as are issues of assignment, delegation, and novation.

Sales of real property begin with a contract (in writing, Chapter 13), and end with a deed (or an easement, or an encumbrance, etc.), which is an official, non-contract document transferring (and representing, for recording purposes) an interest in land. In fact, documents transferring interests in land are often subject to the same requirements as are contracts (e.g., interpretation, Chapter 14). Interestingly, the purchase of interests in land, here with a focus on buying real property, usually involves three parties: the seller, the buyer, and a party providing the financing. When a buyer takes over title to land, such buyer is faced with the issue of addressing the seller's duties to the bank or mortgage company that financed the seller's purchase. This raises the specter of possible need to address third-party beneficiary and possibly even assignment/delegation rules.

Very briefly, where a buyer "assumes a mortgage," that buyer promises to pay the seller's lender(s), which is a third-party-beneficiary scenario. The promise is made to the seller, but for the clear benefit of the seller's lender. The seller's lender *could* agree to a *novation* such that the seller is off the hook for payment of the loan, but you may ask yourself why a lender would do this when the lender can have two parties to sue (the seller who took out the loan and the buyer who assumes payment for it). The lender would have enforceable rights as a third party beneficiary to a buyer's promise to the seller. Where a buyer takes "subject to a mortgage," that buyer promises the seller to make the mortgage payments, but generally without an intent to directly benefit the seller's lender. Disappointed lenders would have to sue their sellers directly when the buyers fail to pay (and the sellers then in turn have the right to sue the buyers for breach of their promises to pay a loan for the benefit of their sellers). While it would look like the delegation of duty by a seller to buyer to pay the seller's loan (and thereby prevent sale of the property based on the mortgage), most if not all jurisdictions treat the benefit to a lender as incidental at best. For a Florida case addressing some of these issues, *see McVeigh v. Mirabito*, 556 So.2d 1226 (Fla. 4th DCA 1990). A word of caution is in order. If one is not careful, he or she may begin to see direct or incidental beneficiaries around every corner. Plaintiffs' lawyers should be looking for any possible payer of amounts deemed to be owed their clients. Defendants' lawyers should be looking to foist damages and expenses onto anyone but their own clients.

IMPORTANT TOPICS TO HAVE MASTERED IN CHAPTER 23

70. The elements required for third party beneficiaries to have enforceable rights in contracts of insurance/health care coverage (which actually applies to other third party beneficiary situations)
71. The nature of the contractor/subcontractor relationship as well as that of a party that contracts with numerous other parties individually on major projects, which could be a governmental entity

SUGGESTED EXERCISE(S)

1. Draft a one-page, three-paragraph analysis of the *Commercial Carrier Corp*. case discussing the sovereign immunity, tort liability, and their interrelation with contract law and the concept of *respondeat superior* (agency).

2. Do some preliminary research to identify some of the special contracts-based rules developed in admiralty courts.

CHAPTER 24: PRE- & DURING-FORMATION "INNOCENT" DEFENSES

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There are numerous defenses to the enforcement of formed contracts. Many casebooks cover the standard litany of defenses but fail to illuminate a temporal distinction that may assist in the understanding of the justification for permitting how the defenses operate. From a temporal perspective, the contractual defenses fall into two basic categories: (1) those where the potential problem arises before or during formation, and (2) those that arise after formation. This Chapter and Chapter 25 concern the first category – where the problem arises at around the time of formation. (The difference, dare was say it, is a contractual rather than a criminal form of *mens rea*). Chapter 26 addresses post-formation problems that may also provide a defense to enforcement.

There is also a disconcerting failure of most jurisdictions to clarify what kind of misinformation is so flawed that it supports a finding that formation is lacking, on the one hand, and what kind is flawed but not as bad, which supports a finding that a defense may be asserted against formation, on the other. Review of the literature does not uncover the secret about choosing

between a mistake that prevents formation and one that may support non-enforcement. Perhaps the distinction lies in the procedural posture of a case. Sometimes it is best that the weaker party choose between disavowal and enforcement. At other times, then it may be proper to make clear by policy that some things are wrong from the start, i.e., they are void. Another possible factor is the state of performances by the parties. It may be easier to "void" a contract in its early stages, whereas treating it as "voidable" after significant performances have occurred – to foster negotiations, settlement, etc., before a court decides whether to permit or deny use of the defense.

1. Voidable versus Void

A contract that is *void* is unenforceable. There are good reasons for this. For example, murder-for-hire contracts are against public policy and are never enforceable under any circumstances (i.e., "void"). But what of other questionable tactics? Should the weaker party nevertheless keep the bargain if it is a good one (i.e., "voidable")? Should the bad actor be able to use the defenses in order to escape bad bargains?

GRIFFIN v. ARX HOLDING CORP.

District Court of Appeal of Florida, Second District, 2016

208 So. 3d 164

* * *

To determine whether a contract is voidable or void, courts typically ask whether the contract has been made under conditions that would justify giving one of the parties a choice as to validity, making it voidable, *e.g.,* a contract with an infant; or whether enforcement of the contract would violate the law or public policy irrespective of the conditions in which the contract was formed, making it void, *e.g.,* a contract to commit murder. *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422, 431, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998) (Breyer, J., concurring). "For a contract to be deemed unenforceable as illegal or contrary to public policy, its purpose or object must be contrary to a law or policy of the state." *Alliance Metals, Inc., of Atlanta v. Hinely Indus., Inc.,* 222 F.3d 895, 899 (11th Cir.2000); *see also Beamer,* 411 F.Supp.2d 882.

* * *

2. Statute of Frauds

Another defense is that a contract is not in writing for those historically identified contracts that are prone to fraud (marriage, interests in land,

performance that requires over one year, etc.). These were addressed in Chapter 13 and students may remember the *mylegs.com* mnemonic device. Technically this is a defense, not an element of formation. However, because it is so well known and so often thought of as an element and not a defense, addressing it in close proximity to the *formation* issues, while alerting that it is actually a defense, honors logic and accentuates a very important contradistinction.

3. Mistake

Both forms of *mistake* that afford a defense to enforcement would take place in the contract-formation phase (pre- or during formation). The mistake may be unilateral, or it may be mutual. There is a significant difference between the two. For the first, state case law indicates that the mistake in the case of a qualifying *unilateral mistake* must be fairly obvious, often clerical (e.g., missing a zero as the bidding price in a major construction bid). Moreover, cases tend to require enforcement of a contract as written, despite this kind of mistake, unless enforcement would be *unconscionable*. There is no requirement that enforcement be *unconscionable* in the case of a *multilateral mistake*. In other words, it is easier to convince courts to recognize the defense of mistake where it is a mutual one; the burden of proof is higher for proving a unilateral one. This is made clear in Florida by comparing the "two-prong" burden of proof for unilateral mistake and the "one-prong" one for a mutual mistake (the difference being that the former requires proof that enforcement would be unconscionable).

A. Unilateral Mistake

DePRINCE v. STARBOARD CRUISE SERVICES, INC.

District Court of Appeal of Florida, Third District, 2015

163 So. 3d 586

ROTHENBERG, J.

Thomas DePrince ("DePrince") appeals the trial court's order granting summary judgment in favor of Starboard Cruise Services, Inc. ("Starboard") on DePrince's claims against Starboard for breach of contract, specific performance, and conversion. Because we find that disputed issues of material fact remain to be resolved on all three counts of DePrince's complaint, we reverse and remand for further proceedings.

Historical Hollywood starlet Mae West once said, "1 never worry about diets. The only carrots that interest me are the number of carats in a diamond."

Thus, it appears quite likely that Ms. West would have been interested in the diamond in this case: a twenty carat diamond that Starboard offered to DePrince for a very low sum. As it turns out, the “too good to be true” price of the diamond was just that, and the price conveyed to DePrince was a mistake. Now DePrince wants his twenty carat diamond; Starboard wants out of its sales contract; and Starboard's supplier, who allegedly misquoted the price of the diamond upon which Starboard and DePrince relied, has not even been added as a party to the lawsuit. In short, this is truly a gem of a case.

FACTUAL BACKGROUND

DePrince embarked on a cruise from Miami in February 2013. During that cruise, DePrince visited an onboard jewelry shop that is wholly owned and operated by Starboard. When DePrince expressed some interest in a large loose diamond [Footnote omitted] and specified to the sales manager of the store, Mihai Rusan (“Rusan”), that the stone should be between 15 and 20 carats, Rusan, who had never dealt with a diamond of such magnitude, sent an email inquiry to Starboard's corporate office in Miami (“the Miami Office”).

Starboard maintains a consignment agreement with a supplier, Sophia Fiori (“Fiori”), [Footnote omitted] that allows Starboard to obtain gemstones and jewelry for sale in its onboard stores. The consignment agreement between Starboard and Fiori specifies, in relevant part:

3. Title to the Consigned Merchandise shall at all times remain with Consignor until the time of its sale to customers of Consignee, whereupon the Consigned Merchandise shall be deemed to have been purchased from Consignor by Consignee. [Footnote omitted]

Upon receiving the email inquiry from Rusan, the Miami Office relayed the information to Fiori to determine whether Fiori could fill such an order should DePrince decide to purchase a diamond. Fiori responded to the Miami Office via email, informing Starboard that there were two diamonds of that size available. Fiori's email described the diamonds precisely as follows:

1. EMERALD CUT 20.64 carats D VVS2 GIA VG Price $235,000

2. EMERALD CUT 20.73 carats E VVS2 GIA EX EX FNT Price $245,000

The Miami Office relayed this information to Rusan via email exactly as Fiori had typed it. Rusan notified DePrince of the availability of the size of the diamond he was interested in purchasing and the pricing information contained in the email, telling him that the purchase prices for the diamonds were $235,000 and $245,000 respectively.

DePrince told Rusan that he was interested, but that he would like to take some time to think about the purchase. That night, DePrince spoke with his life partner, Vernon Crawford, a certified gemologist who was on the cruise with DePrince, and also DePrince's sister, Carolyn DePrince, who holds the highest available degree in gemology. Both advised DePrince against making the purchase, telling him that the sale price was too good to be true and that the price for a diamond that large should be at least $2 million.

DePrince, however, ignored their advice and opted to complete the transaction. DePrince returned to Starboard's onboard jewelry store and placed a special mail purchase order for the 20.64 carat diamond the next day. Rusan prepared and signed a one-page sales agreement that listed the total price for the diamond at $235,000 plus a $25 shipping charge. DePrince made an initial down payment of $125,000 on the spot and paid the balance ($110,025) the next day. The parties agreed to have the diamond shipped to the Gemological Institute of America laboratory in New York so that a neutral gemologist could verify that the diamond that was shipped was the same one specified in the sales agreement.

Soon after the sale was completed, Starboard learned that Fiori's $235,000 price quote in the email was the per carat price for the diamond rather than the total price for the diamond ($4,850,400), and thus, Starboard had inadvertently contracted to sell the diamond to DePrince for less than 1/20th of the diamond's actual value. Five days after the sales agreement was executed, Starboard contacted DePrince via telephone to explain the situation, stating that the price on the sales agreement was “seriously in error” due to the mix-up in the email. Starboard offered discounted future cruise rates to DePrince to compensate him for the inconvenience, but DePrince demanded that the sale be completed as specified in the sales agreement. Starboard unilaterally reversed the charges on DePrince's credit card to refund him all the money he had paid and then repudiated the sales agreement, informing DePrince that it would not be shipping the diamond as they had originally agreed. These communications were memorialized in an email Starboard sent to DePrince after the phone call. The record does not disclose how Starboard dealt with the cancellation of the sale with regard to Fiori.

Thereafter, DePrince filed a complaint against Starboard alleging counts for specific performance, breach of contract, and conversion. Starboard answered and pleaded the affirmative defense of unilateral mistake, among others, claiming that Rusan had misquoted DePrince the total price of the diamond rather than the per carat price and that DePrince had known about the error the whole time due to his extensive experience with jewelry. Starboard also counterclaimed for a declaratory judgment that the sales agreement was unenforceable and for rescission of the contract.

* * *

ANALYSIS

* * *

1. Contract Formation and Enforcement

On appeal, Starboard has raised two defenses to the sales agreement's formation and enforcement. First and primarily, Starboard claims that a unilateral mistake of law prevents the contract from being formed. Second, Starboard summarily raised an unconscionability defense in its briefing and then pressed that point more extensively at oral argument. For the reasons that follow, neither of these arguments entitle Starboard to summary judgment on DePrince's breach of contractclaim. Moreover, the trial court seemed to make a sua sponte finding that DePrince had not alleged any actionable damages to support his breach of contract claim. That ruling was also in error. We explain each of these theories at length because there appears to be a great deal of misunderstanding in each of these areas.

A. Unilateral Mistake

There are three potentially viable tests to determine whether a contract may be rescinded based on a unilateral mistake of fact: (1) A four-prong test requiring the highest burden of proof for the party seeking to avoid the contract; (2) a two-prong test requiring the lowest burden of proof for the party seeking to avoid the contract; and (3) a 3–prong disjunctive test that provides several more-flexible methods of establishing a unilateral mistake.

This Court's most recent decisions on this topic clearly articulated and reaffirmed the viability of the four-prong test to establish a unilateral mistake, *Rachid v. Perez,* 26 So.3d 70, 72 (Fla. 3d DCA 2010), and this panel—along with the trial court—is of course bound by that decision, *see State v. Washington,* 114 So.3d 182, 188–89 (Fla. 3d DCA 2012) (“This panel is not free to disregard, or recede from, [a prior decision from this Court]; only this Court, sitting en banc, may recede from an earlier opinion.”). However, it matters not which test is applied at this stage of the proceedings because we find that the trial court's summary judgment order cannot be upheld due to a unilateral mistake of fact under any of these three formulations. Thus, the trial court's order granting summary judgment cannot be upheld based on a unilateral mistake of fact. We analyze each of these three tests in turn to clarify what appears to be a confusing area of the law with inconsistent application among Florida's district courts of appeal.

1. This Court's Four–Prong Test for Unilateral Mistakes of Fact

This Court has held that in order to rescind an otherwise-valid contract [Footnote omitted] based on a unilateral mistake, the party seeking to avoid the contract must show:

> (1) [T]he mistake was induced by the party seeking to benefit from the mistake, (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo, (3) denial of release from the agreement would be inequitable, and (4) the position of the opposing party has not so changed that granting the relief would be unjust.

Rachid, 26 So.3d at 72 (quoting *Lechuga v. Flanigan's Enters., Inc.,* 533 So.2d 856, 857 (Fla. 3d DCA 1988)); *Ali R. Ghahramani, M.D., P.A. v. Pablo A. Guzman, M.D., P.A.,* 768 So.2d 535, 537 n. 1 (Fla. 4th DCA 2000). Examining the facts as alleged and supported by DePrince, Starboard did not conclusively demonstrate either of the first two prongs of this analysis. [Footnote omitted]

First, Starboard presented no evidence that DePrince induced it into making the pricing mistake. The primary focus of Starboard's argument, both at the summary judgment hearing and in its brief, was that DePrince must have known of the mistake in pricing due to his background as a former antiques and jewelry dealer and the advice he received from his gemologist partner and his sister. DePrince, however, denied that he knew there had been a pricing mistake in his affidavit, which is sufficient at the summary judgment phase of the proceedings to create a genuine issue of material fact. More importantly, we note that even if DePrince had known that the price he was quoted to purchase the diamond was in error, knowledge of an error is markedly different than inducement of that error. *See, e.g., Gemini Investors 3, L.P. v. Nunez,* 78 So.3d 94, 97 (Fla. 3d DCA 2012) (explaining that fraudulent inducement requires that the party seeking to enforce the contract "(1) made a statement concerning a material fact, (2) knowing that the statement was false, (3) with intent that the [mistaken party] act on the false statement; and (4) the [mistaken party was] damaged as a result of [its] reasonable reliance on the false statement"). [Footnote omitted] Because Starboard presented no evidence that the pricing mistake was induced by DePrince, the trial court clearly erred by granting summary judgment in Starboard's favor under the four-prong test.

Second, there is a factual dispute regarding the second prong of the unilateral mistake standard: that the party seeking to avoid the contract (Starboard) was not inexcusably negligent or failed to act with due care. DePrince avers in both his complaint and affidavit that Starboard did not act with due care when it sold him the diamond. Starboard claims it simply provided DePrince with the quote provided to it by Fiori, and that it did not act negligently. Thus, whether Starboard made a reasonable and understandable mistake or acted negligently in its handling of the sale is a disputed issue of fact, and, because questions involving reasonableness and negligence determinations are highly factual inquiries upon which reasonable

people could disagree, they are rarely appropriately resolved on summary judgment. *Spadafora v. Carlo,* 569 So.2d 1329, 1331 (Fla. 2d DCA 1990). This case is no exception.

2. The Two–Prong Test for Unilateral Mistakes of Fact

Although we have determined that Starboard has not satisfied its burden of meeting the four-prong test adopted by this Court to set aside a contract for unilateral mistake for purposes of summary judgment, Starboard contends that the two-prong test for pleading and proving a unilateral mistake is the test that should be applied. Starboard's argument is not wholly without merit, and in fact, numerous Florida cases have relied on the two-prong standard. Most recently, in *Garvin v. Tidwell,* the Fourth District Court of Appeal stated "that a trial court may rescind an agreement based on unilateral mistake if '(1) the mistake did not result from an inexcusable lack of due care, and (2) defendant's position did not so change in reliance that it would be unconscionable to set aside the agreement.' " 126 So.3d 1224, 1228 (Fla. 4th DCA 2012) (quoting *Stamato v. Stamato,* 818 So.2d 662, 664 (Fla. 4th DCA 2002)); *see also Fla. Ins. Guar. Ass'n v. Love,* 732 So.2d 456, 457 (Fla. 2d DCA 1999) (applying the same two-prong test); *U.S. Alliance Corp. v. Tobon,* 715 So.2d 1122, 1123 (Fla. 3d DCA 1998) (same); *BMW of N. Am., Inc. v. Krathen,* 471 So.2d 585, 588 (Fla. 4th DCA 1985) (same).

The two elements in the two-prong test are in substance nearly identical to two of the four prongs relied upon by this Court. Indeed, the four-prong test largely restates the two-prong test and adds the elements that "the mistake was induced by the party seeking to benefit from the mistake [and] ... denial of release from the agreement would be inequitable." *Rachid,* 26 So.3d at 72 (quoting *Lechuga,* 533 So.2d at 857). Interestingly, both the courts espousing the four-prong test and the courts applying the two-prong test all seem to rely on the Florida Supreme Court's decision in *Maryland Casualty Co. v. Krasnek,* 174 So.2d 541 (Fla.1965), to support their variant formulations of the standard. *Compare Lechuga,* 533 So.2d at 857 (citing *Krasnek* after articulating a four-prong test for unilateral mistake) *with Krathen,* 471 So.2d at 588 (citing *Krasnek* to support its two-prong test). Although *Krasnek* clearly states the two-prong test, the additional prongs of the four-prong test can be inferred from the opinion as well. *Krasnek,* 174 So.2d at 543–44.

Most importantly in this case, however, is the fact that both the two-and the four-prong tests require that the party seeking to invoke a unilateral mistake of fact as an affirmative defense establish that he was not unduly negligent in forming the contract. As explained above, a genuine question of fact remains regarding whether Starboard was negligent in this

case, thereby precluding summary judgment under the two-prong standard as well.

3. Florida's Jury Instruction for Unilateral Mistakes of Fact

Lastly, although neither party initially argued for the application of the third test to establish unilateral mistake, Florida's new jury instruction, which was adopted in June 2013, *In re Standard Jury Instructions–Contract and Bus. Cases,* 116 So.3d 284, 324 (Fla.2013), pertaining to unilateral mistake states the test in yet another substantially different way:

> To establish [the defense of unilateral mistake], (defendant) must prove all of the following:
>
> 1. (Defendant) was mistaken about (insert description of mistake) at the time the parties made the contract;
>
> 2. [The effect of the mistake is such that enforcement of the contract would be unconscionable]
>
> [or]
>
> [(Claimant) had reason to know of the mistake or [he][she][it] caused the mistake.]
>
> and
>
> 3. (Defendant) did not bear the risk of mistake. A party bears the risk of a mistake when
> [the parties' agreement assigned the risk to [him][her][it]]
> [or]
>
> [[he][she][it] was aware, at the time the contract was made, that [he][she] [it] had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract].

Fla. Std. Jury Instr. (Civ.) 416.26 (first alteration added).

This instruction is nearly identical to the formulation of the unilateral mistake defense found in the Restatement (Second) of Contracts. *See* Restatement (Second) of Contracts §§ 153, 154 (1979). However, this particular three-prong test has not been adopted or cited by any Florida decision to date. “Standard jury instructions are not binding precedent,” although they can be quite persuasive and instructive “[i]n the absence of a definitive case.” *BellSouth Telecomm., Inc. v. Meeks,* 863 So.2d 287, 292 (Fla. 2003). In this instance, however, because there are definitive

cases in this jurisdiction, we are bound by those cases. And in those cases, this Court clearly applied the four-prong test. *See Rachid,* 26 So.3d at 72; *Lechuga,* 533 So.2d at 857.

Even if jury instruction 416.26 was the law in Florida, Starboard should not have prevailed on its summary judgment motion. That is because even if DePrince had been aware of the mistake and enforcement of the contract would be unconscionable—either or both of which would satisfy the second prong of the analysis—the third prong requires that the party seeking to assert the unilateral mistake defense show that it did not bear the risk of the mistake. Fla. Std. Jury Instr. (Civ.) 416.26. A party can be found to bear the risk of its mistake if the contract expressly assigns that risk to the party or if that party is aware at the time of the contract's formation that it had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract anyway. The contract in this case does not assign the risk to either party, and factual questions certainly remain as to whether Starboard should have known at the time it formed the contract that it had insufficient information to facilitate such an expensive transaction. Indeed, Rusan himself stated in his deposition that he had never dealt with a diamond this large. Because this factual question remains, summary judgment would also have been inappropriate under the new jury instruction.

To reiterate our position on unilateral mistakes of fact, this Court currently adheres to the four-prong test as stated in *Rachid* and *Lechuga.* There are at least two other tests—the two-prong test found primarily in other districts' case law and the three-prong test found in standard jury instruction 416.26—in Florida jurisprudence. The existence of three different tests has caused a great deal of confusion in the case law and to litigants and trial courts. However, under any of these three tests, Starboard should not have prevailed on summary judgment based on its unilateral mistake of fact defense.

* * *

We therefore conclude that while some may claim that diamonds are forever, the same cannot be said of the trial court's summary judgment order.

Reversed and remanded.

Note

The fact that the districts have applied different tests for the requirements of unilateral mistake (two-prong, three-prong, and four-prong) made reconsideration likely when the District Court of Appeal for the Third District of Florida adopted a not-yet-disavowed four-prong test requiring some level of inducement made by the party against whom the defense of unilateral mistake

was asserted. *See DePrince v. Starboard Cruise Services, Inc.*, 163 So. 3d 386 (Fla. 3d DCA 2015). The Court's inclusion of the three-prong Standard Jury Instruction test created by the Florida Supreme Court probably anticipated some guidance on correcting the confusion. The District Court of Appeal for the Third District reconsidered the issue *en banc* in the yet-unpublished *DePrince v. Starboard Cruise Services, Inc.*, 43 FLA. L. WEEKLY D1743a. What this opinion makes clear is that inducement by the non-defending party leading to the unilateral mistake is NOT required. The main elements of the defense then track the three-prong jury instruction: (1) mistake not the result of an inexcusable lack of care; (2) denial of the defense to enforcement would be inequitable; and (3) the non-mistaken party has not so changed its position in reliance that to permit the defense would be unconscionable. It is interesting to see the Supreme Court orchestrating a correction in a District Court of Appeals' approach by reversal with guidance rather than certification of a conflict and resolution at the Supreme Court level.

B. Mutual Mistake

RAWSON v. WMLIC VP, L.L.C.

District Court of Appeal of Florida, First District, 2006

933 So. 2d 1206

ERVIN, J.

* * *

The lower court also concluded that the mistake as to the quantity of the property conveyed was not material to the contracts entered into between the parties. We find no factual support for such determination. In this regard, section 152 of the Restatement (Second) of Contracts (1979), provides in part:

> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made

> has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

We consider the record clear that the basic assumption on which the contract was made was that all three parcels would be contiguous for the purpose of carrying out the Rawsons' intended use. Dr. Rawson testified that he intended to fence the property for horses, build a pond and have wildlife habitats in the wetland portions of the property. Instead, as a result of the erroneous legal description, the Rawsons have title to two separate, divided pieces of property, with separate access routes.

Despite the lower court's factual inaccuracies and erroneous legal conclusions, we decide reversal is not required because the court otherwise reached the correct legal result. The court's alternative determination that the contract allocated to the Rawsons the risk of the parties' mutual mistake is supported by the record. As a consequence, we agree that the lower court did not abuse its discretion in denying rescission of the contracts, which is the standard applicable to the review of an order deciding the equitable remedy of rescission. *See Pendleton v. Witcoski,* 836 So.2d 1025 (Fla. 1st DCA 2002).

To obtain such relief, a plaintiff must not only prove mutual mistake regarding a basic assumption underlying the contract, but must also establish "that the contract did not put the risk of mistake on the party seeking rescission." 27 Richard A. Lord, *Williston On Contracts,* § 70:69, at 415 (2003). *Accord* 13 *Am.Jur.2d Cancellation of Instruments* §§ 27, 29 (2006). As earlier stated, a mutual mistake affecting the basic assumption on which the contract was made may require a voidance of the contract unless the adversely affected party bears the risk of the mistake. In this regard, section 154 of the Restatement provides:

> A party bears the risk of a mistake when
>
> a) *the risk is allocated to him by agreement of the parties* or
>
> b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

(Emphasis added.)

In discussing the effect of section 154, Professor Lord makes the following pertinent comments:

A broadly[ ] worded provision[ ] in a contract that shifts the risk of a mutual mistake may be quite effective; even though a contract provision does not specify the particular kind of risk contemplated, the risk still can shift. Such a broad clause may prevent later attempts at rescission and may simply indicate that the buyer accepts the risk of loss that might arise from any material mistake as to the condition of the property sold.

Williston on Contracts, § 70:79, at 441 (footnotes omitted). Moreover, an "as-is" clause in the contract stating that the sale is made "as-is, where-is and with all its faults" assigns the risk to the buyer, as do disclaimers of any warranty or guarantee concerning the property. *Id.* § 70:80, at 448. Finally, Professor Lord concludes by noting: "An underlying basis of most contracts ... is that the buyer has had ample time to consider the consequences and a full opportunity to engage in due diligence as to the property being offered for sale.... The mistake of risk can be placed foursquare on the shoulders of a party who has had the opportunity to conduct the necessary due diligence, but has failed to do so." *Id.* at 457.

A review of the pertinent terms of the auction real estate sales contract discloses that the risk of the mistake was clearly placed on the Rawsons. The auction brochure, as the trial court pointed out in its final judgment, contained an express disclaimer that the dimensions and acreage of the parcels were believed to be correct, but that it was the purchasers' responsibility to confirm the calculations. Moreover, paragraph 8(c) of the sales contract explicitly warned the purchasers not to rely on any of the seller's representations without verifying them, and the Rawsons, as purchasers, acknowledged it was their responsibility to make such inquiries and investigations as deemed necessary or appropriate in regard to title of the property. [Footnote omitted] The Rawsons additionally admitted in the contracts that they were purchasing the property "in an 'as is, where is' condition 'with all faults,' " and had executed the contract based solely on their own investigations and findings, and not in reliance on any information provided by the seller, the broker or the auction company. Indeed, they further agreed they had not relied upon any information, maps or sketches, statements or other representations made by or on behalf of the seller or the auction company. Notwithstanding the Rawsons' acknowledgments, they proceeded to the subsequent closing without first ordering a survey of the property or obtaining a title search to determine the acreage or a correct legal description, despite being advised by the contracts that if a defect in the title was disclosed which the seller was unable to cure, the purchasers could, at their option, terminate the contracts without liability, and the seller would refund their deposit.

The Rawsons nonetheless contend that their admissions were superseded by other provisions in the contracts requiring UMLIC to convey fee simple title to them by general warranty deed, which contained the same defective legal

description as that in the Visual Aid displayed at the auction. They rely on *Star Apartment, Inc. v. Martin,* 204 F.2d 829, 830 (5th Cir.1953), and *Sutton v. Cast–Crete Corp. of Florida,* 197 So.2d 556 (Fla. 2d DCA 1967), for the rule that if a seller contracts to convey title to the property specified in a contract of sale, which it is impossible for the seller to do, the buyer has no duty to search the public records to determine whether the seller could perform its obligation.

* * *

Under the circumstances, we do not consider the holding in *Wilkey* persuasive as to the proper outcome of the present appeal. As previously recited, the real estate sales contract in the case at bar placed the purchasers on notice that not only were they purchasing the property in an "as-is" condition, but that it was their responsibility to make such other investigations as they deemed necessary and they were not relying upon any "guarantee or warranty ... that may have been given ... by ... the seller or the Auction Company." This distinguishing language in the sales agreement reveals that the Rawsons agreed, by not making further inquiries, to waive any objection they might have as to a defect in the condition of the property conveyed, and to relinquish any challenge that might develop relating to a defect in title.

The facts in *SMB Partners, Ltd. v. Osloub,* 4 S.W.3d 368 (Tex.Ct.App.1999), highlight this distinction. There, a purchaser of real property brought an action for damages against the seller, alleging that the vendor committed statutory fraud in misrepresenting the size, shape and location of an easement on the property sold. The seller defended, contending that an "as-is" clause in the parties' earnest-money contract precluded the buyer from relying on any oral misrepresentations by the seller as to the size of the easement. In rejecting this argument and affirming the judgment for the purchaser, the court noted that the provision in the contract expressly stated that the seller was conveying the property as is, without any representations or warranties, "except for the warranty of title contained in the deed." As stated, the sales agreement at bar made no reservations as to the warranties.

Because the parties' real estate contracts clearly and unambiguously allocated the risk of loss to the purchasers, the lower court's final judgment denying rescission is

AFFIRMED.

Notes

1. Worthy of recall is the fact that courts sometimes struggle between finding that a factual misunderstanding caused a lack of formation or that

formation occurred but that one party may be entitled to assert a defense to enforcement. The second paragraph of this Chapter addresses the issue, and attorneys should be aware of the lack of definitive clarity.

2. Florida law is really no different, but a national approach, expected by the Multistate Bar Exam (MBE), defines mutual mistake to contain four or five elements: (1) a mistake of fact by both parties (not of law) existing at the time of formation; (2) the mistake goes to a material (not unimportant) fact; (3) the mistake goes to a basic assumption of the contract (such as who must pay the shipping or the taxes, if such are considerable); and (4) the harmed party arguing for non-enforcement based on the defense did not expressly or impliedly assume the risk of the mistaken fact.

3. The elements for unilateral mistake, for purposes of a national approach expected by the Multistate Bar Exam (MBE) (and again, Florida law would be virtually no different), are just a bit different than for mutual mistake: (1) mistake by one party; (2) going to an essential element of the contract being formed; and (3) the non-mistaken party either (a) caused the mistake, or (b) had a duty to disclose the mistake, or (c) should have known that the other party was mistaken (and therefore should have pointed it out rather than take advantage of it).

Problem 24-1

Father was in the market to purchase Daughter a new car for her sixteenth birthday. Knowing that her favorite color was blue, Father wanted to surprise her with a car in Daughter's favorite color. On the day Father went to purchase a blue car at Dealer's car dealership, it was particularly overcast and shady due to an incoming storm. Dealer showed Father a "blue" car, which Father purchased for $20,000 on the spot. The purchase agreement stated that Dealer had sold Father the car for $20,000 and that it was blue. The next day, when the sun was shining, Father realized that the car was actually black and not blue as indicated at the time of purchase. If Father raises a defense to the enforceability of the sale, what is Father's best argument? What else might work?

Problem 24-2

Homeowner recently contacted Mower and inquired into the landscape services his business offers. After learning of Mower's services, Homeowner hires Mower to mow his yard for $50, with no indication of Homeowner's back yard needing to be mowed. In the landscaping industry, the term "yard" only refers to the front yard unless specifically indicating the back yard needing to be mowed. After Mower finishes mowing, Homeowner was shocked to see the

results and demanded half of his money back. If Homeowner raises a defense to the service contract, what is Homeowner's best argument?

4. Legal Capacity

There is a bit of controversy over whether legal capacity to enter into a contract is a formation issue (i.e., an element) or whether it is not an element, but a potential defense to enforcement of the contract. Review of Florida case law indicates that Florida courts treat the lack of legal capacity as a potential defense to enforcement, and not as a required element of formation. The reason likely stems from the reasons behind continuing to recognize the distinction between *void* and *voidable* contracts theorized at the beginning of this Chapter. Interesting to note is the requirement of active *disavowal* within a specific time frame in order for a party lacking legal capacity to successfully assert this defense against enforcement. Due to the sensitive public policies surrounding protection of minors and of the mentally infirm, there are special rules and exceptions of which to be aware.

A. Minors

PUTNAL v. WALKER

Supreme Court of Florida, Division B, 1911

55 So. 844

PARKHILL, J.

* * *

An infant's sale of his property, whether it is real estate or personalty, transmits the title, and is voidable only. Its validity does not depend on the ratification after the minor has attained his majority, but to avoid it he must, by some act clear and unmistakable in its character, disaffirm its validity. 16 Am. & Eng. Ency. Law (2d Ed.) 283.

The right of an infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others; and, though its exercise is not infrequently the occasion of injury to others who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant, in exercising the right, is guilty of fraud. *Tucker v. Moreland*, 10 Pet. 58, 9 L. Ed. 345.

How soon after attaining majority the quandam infant or those claiming under him must disaffirm his contract or conveyance, in order to make the plea of infancy effective, is a question upon which the decisions are at variance. Some courts hold to the doctrine that the privilege of avoiding his acts must be exercised by the infant within a reasonable time after coming of age; but the preponderance of authority is that in contracts executed by infants mere inertness or silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intent to assent to the contract, will not bar the right to avoid it.

We think, therefore, that where no estoppel arises against an infant at the time he makes a deed during infancy, and when there are no circumstances and no affirmative acts of his making it inequitable for him to remain inactive after attaining his majority, his mere silence or inertness for a period of less than seven years, as fixed by our statute of limitations, after he reaches his majority, does not bar his right to disaffirm his deed made during infancy.

In *Kountz v. Davis*, 34 Ark. 590, it was held: 'An infant who has executed a deed has seven years after coming of age in which to disaffirm it.' This period of seven years was the period of the statute of limitations, similar to section 1723 of the General Statutes of 1906.

Greenleaf, in the second volume of his work on Evidence (16th Ed. § 367, note 5), says: 'The mere acquiescence for years to disaffirm it affords no proof of ratification. There must be some positive and clear act performed for that purpose. The reason is that by his silent acquiescence he occasions no injury to others, and secures no benefits or new rights to himself. There is nothing to urge him as a duty towards others to act speedily. Language, appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may, therefore, after years of acquiescence, by entry or by conveyance of estate to another person, disaffirm and avoid the conveyance made during his infancy.'

In *McCarthy v. Nicrosi*, 72 Ala. 332, 335, 4m Am. Rep. 418. The court said: 'In the case of an executed conveyance of real estate, or any interest in it, mere acquiescence will not operate as ratification. There must be some positive and unequivocal act performed for the purpose which is inconsistent with the subsequent right to repudiate it, unless sale and conveyance have been acquiesced in for a length of time sufficient to perfect a bar under the statute of limitations.'

In *Wimberly v. Jones*, 1 Ga. Dec. 91, the holding is as follows: 'An infant, on arriving at full age, may disaffirm his deed by conveying the same property to another, if he do so before the statute of limitations gives to the party holding the first deed a statutory title.' *See, also, Hoffert v. Miller*, 9 Ky. Law Rep. 732, 6 S. W. 447; *Boody v. McKenney*, 23 Me. 517; *Davis v. Dudley*, 70 Me. 236, 35

Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Shipp v. McKee*, 80 Miss. 741, 32 South. 281, 92 Am. St. Rep. 616; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Hughes v. Watson*, 10 Ohio, 127; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445; Birch v. Linton, 78 Va. 584, 49 Am. Rep. 381.

* * *

The deed made by Wilcox to Walker describes Wilcox as an unmarried man, over the age of 21; but Walker testified that he remembered that Mr. Hendry, who prepared the deed from Wilcox to Walker, read the same at the time it was executed, but he said he did not 'remember the clause in reference to Wilcox being over the age of 21 years. That made no impression on me, because 1 thought all deeds in Florida had to show that.' He further testified, in reference to the words 'over the age of 21': 'As a matter of fact, 1 * * * did not know they were there till a year or two later.'

J. A. Putnal testified that the deed was read in his and Walker's presence by Mr. Hendry, deputy clerk of the court, and Putnal asked Walker if he was aware of the fact that he was trading with a minor. Putnal said that, prior to the making of the deed, he told Walker Wilcox was a minor.

W. H. Evans testified that, when the deed was drawn up, Putnal asked Walker if he knew what he was doing. Walker said he thought he did. Putnal said: '1 guess you know he is a minor.'

W. T. Hendry testified that he was deputy clerk of the circuit court when Wilcox made the deed in question to Walker. Hendry prepared the deed. He testified that Putnal told him that Wilcox was a minor; that the question of Wilcox being a minor arose at some time during the preparation of the deed; that Putnal raised the question of Wilcox being a minor in Walker's presence, while the deed was being drawn or prepared. 'While the deed was being prepared, Mr. Putnal was sitting to my right, and Mr. Walker was sitting to Wilcox's left.' Mr. Walker testified that he 'remembered a conversation of Mr. Putnal's a *half* hour later, something after the trade, out in the hall of the courthouse, and he asked me something about my having traded with a minor.' Putnal stated that Wilcox was a minor. He further testified that the mule was delivered to Wilcox a few minutes after the deed was made. He did not recollect 'for sure' whether he saw Mr. Putnal after delivering the mule to Wilcox, but thought he did. Walker was asked: 'Isn't it more likely that this conversation [with Putnal about Wilcox's minority] was had in the hall before you went to deliver the mule, and after the mule was delivered that the party separated?' He answered: '1 am not impressed that way; 1 don't think so.' On the same day, just after the trade was made, Walker said to J. F. Foster: '1 beat you to it' (meaning the land). Foster replied: 'That boy is a minor, and if you want to buy a lawsuit you are welcome to it.' Walker admitted 'such conversation, or something like it, might have taken place.'

From all this we think Walker had knowledge of Wilcox's minority during the time of the preparation of the deed and before the delivery of the mule that was given for the land. Certainly, from his own admission, he knew this fact in a half hour after the execution of the deed, and took no steps to protect himself. All the evidence shows that Walker knew that Wilcox was a minor. As was said in a like case (Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176): 'There is no evidence whatever in the record that, when Buchanan represented to Cobbey that he was of age, Cobbey believed such representation, or relied on or acted upon it. In fact, all the evidence shows that Cobbey was fully aware of the fact that Buchanan was a minor.'

In *Sims v. Everhardt*, 102 U. S. 300, 312, 26 L. Ed. 87, the court said:

[ ] The question is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt founded either upon reason or authority. Without spending time to look at the reason the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown v. McClune*, 5 Sandf. (N. Y.) 224*; Keen v. Coleman*, 39 Pa. 299 [80 Am. Dec. 524]. A conveyance by an infant is an asserting of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed.'

The youthful appearance of Wilcox seems to have been sufficient to suggest the idea that he might be a minor, for Walker testified that he asked Wilcox if he could make a good deed. Walker was asked: 'Why did you ask him [Wilcox] if he could make a good deed? Did you have any doubt about his being 21?' Walker answered: 'Why, his youthful looks might have went along to prompt the question. His youthful looks, along with other things, might have prompted the question.' Wilcox did not tell Walker he was 21 years old, but told him he could make a good deed, and had made a deed to other property. If this had reference to his having attained his majority, Walker knew otherwise, as we have seen.

There are no other circumstances since he arrived at his majority to work an estoppel against Wilcox to disaffirm his deed to Walker. He did not stand by, and see Walker enter upon the land, and erect improvements thereon, or sell the same to another. The bill filed by Walker alleges the land to be wild and unimproved, and there is no claim here that Wilcox stood by while Walker sold the same to an innocent purchaser. Walker claimed to have owned the land when Wilcox sold it to Putnal and disaffirmed the deed to Walker. Indeed, the evidence shows that Wilcox during the year 1902 went to Cuba and did not return until January, 1908.

The decree is reversed.

ROSE v. SHEEHAN BUICK, INC.

District Court of Appeal of Florida, Third District, 1967

204 So. 2d 903

BARKDULL, Judge.

The appellant seeks review of an adverse final decree in an action seeking a rescission or disaffirmance of a contract.

The record reveals that on or about August 11, 1965, the appellee sold a 1965 Buick Riviera to the appellant for a cash sales price of $5,176.87. At the time of the sale, the appellant was a minor. On March 1, 1966, while still a minor under the age of 21 years, the appellant elected to disaffirm the purchase and notified the appellee of his intention, offering to return the vehicle upon a refund of the purchase price in full. The appellee refused to accept the return of the vehicle or to refund the purchase price thereof, so the appellant (who reached the age of 21 years on April 11, 1966) brought the instant action seeking invalidation of the contract and refund of the purchase price in full. The appellee answered admitting the sale and value of the vehicle, but denying the appellant had ever disaffirmed the contract while still a minor. The answer further alleged the vehicle was purchased as a necessity for the minor appellant; that the appellant was estopped from avoiding the purchase because his demands for rescission were in excess of that to which he was entitled, and that the appellee was entitled to deterioration in the event of disaffirmance by the appellant. After hearing the cause, the court entered the final decree appealed herein, in words and figures as follows:

‘THIS CAUSE coming on to be heard on final hearing, and the Court having heard the testimony of the parties and their witnesses and been advised in the premises,

‘FINDS: The Plaintiff, at age twenty, gave all the appearance of being of legal age. He acted and negotiated for the purchase of the car as an experienced adult. He traded, as part of the purchase price of the new car, his personal car titled in his father's name. His mother advanced part of the cash purchase price. Both his mother and father ratified and confirmed the sale. The car has been used by the Plaintiff since August 11, 1965, to carry on his school, business and social activities. The car is a necessity for this Plaintiff. The attempted disaffirmance of the sale by the Plaintiff was made for trivial

claimed defects in the car. If the disaffirmance were to be allowed, the Defendant would be entitled to an allowance or set-off for the use and depreciation of the car while in the possession of the Plaintiff. However, equity and good conscience will not allow a rescission or disaffirmance of this contract by the Plaintiff. It is, therefore,

'ORDERED, ADJUDGED AND DECREED that final judgment be and is hereby entered in favor of the Defendant, and this cause be finally dismissed at the cost of the Plaintiff.'

The appellant has preserved five points for review on this appeal. First, that the chancellor committed error in preventing a disaffirmance by the plaintiff because he looked or acted like he was not a minor. We find this point to be well-taken. At no time did the plaintiff hold himself out to be an adult, and the agents of the defendant never requested his age of him. The mere fact that he might have had the appearance of a person over twenty-one years of age could not constitute misrepresentation. *See: Correy v. Michaelovitch*, 46 R.1. 387, 128 A. 673, 39 A.L.R. 374; 27 Am.Jur., Infants, s 72.

The second point contends that the chancellor erred in finding that the vehicle was a necessity for the plaintiff. This was a finding of fact, amply supported by the record (*Lamb v. Dade County*, Fla.App.1964, 159 So.2d 477; *Cruger v. Allstate Insurance Company*, Fla.App.1964, 162 So.2d 690) and, therefore, this court will not disturb the decree on this basis.

The third point is that the chancellor erred in finding that the parents ratified the transaction. This finding might be supported by the evidence, but we find that the theory of parents being liable for the necessities of their children is not applicable because there is no relief sought against the parents in the instant cause and they are not parties thereto. *See: Reynolds v. Garber-Buick Co.*, 183 Mich. 157, 149 N.W. 985, L.R.A.1915C, 362.

* * *

Affirmed.

HARTMAN AUTO SALES, INC. v. JAYE

District Court of Appeal of Florida, First District, 1968

214 So. 2d 97

SPECTOR, Judge.

Defendant automobile dealer seeks review of a final order entered by the trial court in an action for recision of a contract whereunder appellee purchased a motor vehicle from said defendant.

The complaint for recision alleged that at the time of the purchase the plaintiff was not yet twenty-one years of age, and that he had advised the defendant at the time of the purchase that he was under twenty-one years of age; further, the complaint alleges that while still a minor, plaintiff disaffirmed the contract, tendering the vehicle in return, but the defendant refused to accept it. Shortly thereafter and while he was still under twenty-one years of age, plaintiff, through his attorneys, made demand on defendant for return of his money and the Honda motorcycle which he had traded in as part of the purchase price.

By his answer, defendant contended that the plaintiff had falsely stated his age to be twenty-one years at the time of the purchase and that such statement was falsely made and had the effect of inducing defendant to enter into the transaction sought to be rescinded. Additionally, defendant's answer contends that the vehicle purchased by the plaintiff was a necessary; and, therefore, the contract for its purchase did not fall within the rule under which a minor may avoid his contracts on the grounds of such minority.

After final hearing and the taking of evidence, the trial court expressly found as a matter of fact that the plaintiff had not misstated his age to the defendant at the time of the purchase, but rather that plaintiff had advised the defendant of his correct age and entered the judgment appealed in favor of the plaintiff.

We have reviewed the evidence considered by the trial judge and find that it amply sustains his finding of fact respecting plaintiff's age as well as the holding inherent in the judgment that the vehicle was not a necessary as to this plaintiff inasmuch as at the time he possessed other means of transportation.

It is contended by appellant that this case is controlled by the principles enunciated in *Rose v. Sheehan Buick, Inc.*, 204 So.2d 903 (Fla.App.3d, 1967). However, the case *sub judice* is clearly distinguishable from *Rose, supra*, for the reason that the trial court there found that the vendor had been led into believing that the purchaser was of legal age; and, further, that the car was a necessary for that purchaser. The opposite factual conclusions were reached in the case at bar.

The other points raised by appellant have been considered, and we find them to be without substantial merit.

Our consideration of the record, briefs, and oral arguments in this case fails to show that the court below committed reversible error in entering the judgment appealed and the same is therefore

Affirmed.

RAWLS, Acting C.J., and JOHNSON, J., concur.

Notes

(57) You have probably noted that this casebook rarely excerpts more than one case for any discrete point. Despite this the last section included three case excerpts. Why? Is there something important to be noted from each?

(58) The *Rose* and *Hartman Auto Sales, Inc*. cases both identify some purchases as *necessaries* or *necessities*. Why? Is there a reason, relating to the ability of a minor to use the defense of infancy? Who does it favor? Can it be viewed to benefit both parties to a contract involving infants? What is the public policy behind it? For a discussion of the necessities exception, which prevents an infant from arguing the incapacity defense, *see* S. Wolf, *A Reevaluation of the Contractual Rights of Minors*, 57 UMKC L. REV. 145, 148-49 (1988).

(59) In some cases, the distinction between "void" and "voidable" is readily apparent. There are as examples *really* illegal contracts, on the one hand, and *misrepresentation* on the other. A good indicator would be where there is statutory pronouncement on the matter. As an example of recognizing an exception to the defense where minors contract for necessities, *see* FLA. STAT. § 743.05 (2018) (minor borrowing money for educational purposes); § 743.045 (minor executing a residential lease); § 743.046 (minor executing agreements for utilities); § 743.044 (minor executing agreement for depository financial services); 743.047 (minor executing agreement for motor vehicle insurance); and § 743.08 (courts may be approved by minors, or parents or guardians of a minor, for artistic or creative services, professional sports contracts). Again, other states are likely to have similar rules, whether in legislation or in case law precedent.

B. Mental Incapacity

DOUGLAS v. OGLE

Supreme Court of Florida, 1920

85 So. 243

REAVES, Circuit Judge.

The appellee, the widow of 1. W. Ogle, deceased, and executrix of his will, filed her bill in the circuit court of Marion county against A. R. Douglas and wife, and from a decree in favor of complainant defendants appealed. We shall refer to the parties herein as complainant and defendants, as they stood in the lower court.

The purpose of the bill was to have a satisfaction of mortgage executed by the deceased to defendants declared void and to foreclose the mortgage which purported to have been satisfied, upon the alleged ground that said satisfaction was procured at a time when the deceased was very old and enfeebled in body and mind to such an extent that he was incapable of understanding the nature, effect, and extent of the transaction, and without consideration, in that the debt secured by the mortgage had not been paid, nor was any consideration paid for the satisfaction, and that said satisfaction was induced by false representations.

* * *

'The distinguishing element of actual fraud * * * is always untruth between the two parties to the transaction, so that actual fraud may be reduced to misrepresentation and concealment.' Not so of constructive fraud. 'Constructive fraud is simply a term applied to a great variety of transactions * * * which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud,' etc. Pomeroy's Eq. Jur. (4th Ed.) § 992. We have no difficulty in agreeing that the evidence does not show actual fraud, but we think the bill sufficiently charges constructive fraud. Without quoting from the bill, we think the brief summary above given is enough to show equity.

The law is well established that inadequacy of consideration, in connection with other inequitable circumstances, will justify the cancellation of an instrument (9 C. J. 1176, § 30); also that mere weakness of mind, unaccompanied by any other inequitable incident, if the person has sufficient

intelligence to understand the nature of the transaction and is left to act upon his own free will, is not a sufficient ground to set aside an agreement (2 Pomeroy's Eq. Jur. [4th Ed.] § 947).

The bill alleges the total absence of consideration for the satisfaction, and that the deceased, when he executed the paper, was so weak-minded as to be 'wholly incapable of understanding the nature and extent of the transaction.'

It is not necessary that there should have been a fiduciary relation between the parties, nor that it be positively shown that the one was not left to act upon his own free will, in order to constitute constructive fraud; but 'inadequacy of consideration, coupled with such a degree of mental weakness as would justify the inference that advantage had been taken of that weakness, will furnish sufficient ground for equitable interference.' 9 C. J. § 40, p. 1177; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 269; Burke v. Taylor, 94 Ala. 530, 10 South. 129; Tracey v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610. And where a contract is executed on an insufficient consideration by one enfeebled in body and mind, a presumption of fraud arises. Holland v. Barnes, 53 Ala. 83, 25 Am. Rep. 595; Boyd v. Boyd, 123 Ark. 134, 184 S. W. 838; Hattie v. Potter, 54 Wash. 170, 102 Pac. 1023; Wilkinson v. Sherman, 45 N. J. Eq. 413, 18 Atl. 228; Pomeroy's Eq. Jur. (4th Ed.) § 947. But the burden to establish the predicatory conditions to the presumption the law thus raises is on him who would avoid the contract. Sellers v. Knight, 185 Ala. 96, 64 South. 329.

In our discussion of the pleadings we have sufficiently covered the assignments of error based on propositions of law. Group 'D.' The assignments under group 'C' are not argued, so we pass to group 'B,' or to alleged errors based on findings of fact.

In this connection it should be kept in mind that the findings of a chancellor on the facts will not be disturbed by an appellate court, unless such findings are clearly shown to have been erroneous. Simpson v. First Nat. Bank of Pensacola, 74 Fla. 539, 77 South. 204; Baggott v. Otis, 65 Fla. 447, 62 South. 362.

Complainant undertook to show the following:

(1) That the debt secured by the mortgage had not been paid, and (2) that the deceased, at the time of executing the satisfaction, was mentally incapable of understanding the nature and extent of the transaction. The law required no more than this, and the chancellor found that both said facts had been proven, and we think he was fully justified in so finding; at least, we cannot say he was not justified.

On the point of whether the debt and been paid, several strong and unusual circumstances tend to corroborate complainant's testimony that it had not. Among them are:

(1) That the mortgage was retained by the deceased and found among his papers with another note (the new note) made by Douglas to him, dated February 5, 1915, for $500.

(2) Defendant says the old note was paid July 6, 1913, and it bears a notation on its face to that effect, but it is doubtful if this notation is in 1. W. Ogle's handwriting. His banker says it is not, and the chancellor found that it is not.

(3) This note as produced by defendant has a paper pasted over the back, thereby completely covering up indorsements on the back. The master, however, by the use of a glass, the application of a pure article of gasoline, and by exposing the paper to the sunlight, found these indorsements to read as follows:

(a) ‘1 consent to an extension to Feb. 5, 15. Note of even date. 1. W. Ogle.’

(b) ‘Note and mortgage extended to Aug. 5, 1. W. Ogle.’

(c) ‘On the mortgage and note of even tenor and date of $440 and $60 to be covered by mortgage No. 6415 done by and the Aug. extended to Feb'y 5, 1915.’

The chancellor also examined this paper, and his reading agrees with the master's except as to the last indorsement, and the variance there is not material. Also the original paper is before this court.

We should mention just here that the file number of the mortgage as indorsed thereon is 6415; also that the note is dated February 5, 1915, and matures August 5, 1915.

(4) The fact that Ogle had the new note, together with the incongruous explanations thereof by defendant: In his answer he says this note was given to Ogle ‘as a means of raising money’ for defendant, ‘which this defendant supposes he intended to use as collateral for the purpose of raising the money.’ This answer is sworn to by defendant. But in his testimony he says this note ‘was just a copy.’ ‘1 did not leave it for him to fill out; it was just a form to show me how he wanted it made out, without any interest and without any date to be paid. 1 was to pay him a certain amount every quarter as long as 1 used the money.’ But he says he got no money on this note.

(5) The indorsements on the back of the old note in Ogle's handwriting, apparently, from dates given and the subject-matter, were made long after the date defendant says the note was paid and turned over to him.

On the other hand, some circumstances tend to corroborate defendant's testimony that he paid the note: (1) That he had it in his possession is a strong circumstance; and (2) that the satisfaction of mortgage was executed reciting that the debt had been paid.

Mrs. Ogle says the defendant acknowledged and promised to pay the debt after her husband died, and she is corroborated by two other witnesses; but defendant denies having done so. In this state of the evidence it is manifest that it was peculiarly the province of the trial court to determine the facts and his findings conclude us.

Deceased's mental state is described by numerous witnesses. Some of them observed him very little, and their testimony is of little value. But the effect of the evidence is that Mr. Ogle had serious and prolonged illness in 1912, and thereafter remained physically and mentally weak until his death in 1917, at the age of 73. It is true that the parties who signed the satisfaction of mortgage as witnesses say that they did not observe any evidence of mental defect at that time, but they were with him very little on that occasion, and the memory of one of them, especially, as to what did occur is shown to be very hazy.

It is impossible for us to say that the chancellor's finding that the deceased did not understand the nature and extent of his act in signing the satisfaction was not justified.

A cross-assignment of error asserts that the court should have foreclosed the mortgage for the amount of the new note instead of limiting his decree to the old note with interest, but this contention must fail. Mrs. Douglas had executed the mortgage to secure the old note, and her husband and the mortgagee could not enlarge the lien on the land to which she had assented in statutory form by increasing the debt, even though they may have thought and intended that the mortgage could and should stand as security for the new note.

The decree should be affirmed.

PER CURIAM.

The record in this cause having been considered by this court, and the foregoing opinion, prepared under chapter 7837, Acts of 1919, adopted by the court as its opinion, it is considered, ordered and adjudged by the court that the decree herein be, and the same is hereby, affirmed.

BROWNE, C. J., and TAYLOR, WHITFIELD, ELLIS, and WEST, JJ., concur.

Notes

1. The *Douglas v. Ogle* case indicates that whereas inadequate consideration causes a contract to fail for lack of formation, the existence of incapacity in one of the contracting parties, without evidence of some bad thing such as the taking advantage of a weak mind, does not nullify the existence of a contract. If there is evidence of unfair advantage, however, or more accurately, the exploitation of the infirmity to create unfair advantage, then the harmed party may assert (but has the burden to prove the existence of) the defense to enforcement based on incapacity. Does this help to explain the difference between "not formed" and "formed, but not enforceable," i.e., why one is a formation issue and the other is a defense to enforcement?

2. The *Douglas v. Ogle* case raises the possibility that proper use of the defense would require some form of bad act or bad faith – the taking advantage of the situation. Though there are similarities, this is still different than the defense for fraud covered in Chapter 25.

C. Drugs & Alcohol

Restatement (Second) of Contracts § 16 Intoxicated Persons (West 1981)

A person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication

> (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
>
> (b) he is unable to act in a reasonable manner in relation to the transaction.

Problem 24-3

Agent had a client who was in love with a piece of real property owned by Landowner, but Landowner was not interested in selling the property at the time. Agent invited Landowner out to dinner in an attempt to try to acquire the piece of property from Landowner. After three bottles of wine, Landowner

decided that it may be a good decision to sell the property he owns. Landowner and Agent immediately enter into a land sale contract whereby Agent would purchase the property for $200,000 and that Landowner would tender a valid deed to Agent the next morning. If Landowner wakes up the next morning and does not wish to follow through with the contract, what is his best defense?

Problem 24-4

Alex has been the primary caretaker for his father, Robert, for the past five years and has been declared Robert's guardian. Robert has early onset dementia but has spells of lucidity more often than exhibiting signs of dementia. Robert loves visiting his local farmer's market and Alex takes him every Saturday morning. One morning while at the farmer's market, Robert approached a booth owned by a yoga studio while Alex was distracted and looking at some local produce in the adjoining booth. The yoga studio owner asked if Robert was interested in yoga classes, to which Robert replied, "Of course! 1'm actually the Dali Lama in disguise!" Robert then signed a contract where Robert would attend 50 yoga classes at a price of $20 per class. Three months later, Robert receives a voicemail that is demanding payment even though Robert has attended none of the classes. What is the best defense for Alex and Robert to be successful in rescinding the contract? Or is it a question of enforcement?

Problem 24-5

Shortly after her 16th birthday, Betty entered a talent show where she sang and played the guitar. What Betty did not know was that a local talent scout was in the audience looking out for future rising stars. Betty's performance was so outstanding that Scout immediately approached her and offered her a record deal where she would record an album, go on a nation-wide tour, and the two entered into an exclusive contract where Scout would be her manager and receive 10% of all tour and record profits. If Betty has a change of heart halfway through recording the album, what is her best defense for backing out of the contract?

Problem 24-6

Susan, a minor who has recently acquired a small inheritance, purchases a home and tenders a down payment of $10,000 to the seller. Also needing to secure a mortgage on the home, Susan goes to Bank and acquires a mortgage to purchase the home. When asked about her age prior to entering into the mortgage contract, Susan lied about her age in order to receiving the funding. Three months later, Susan is struck with homesickness and moves back in

with her parents. Susan fails to make any more mortgage payments and Bank forecloses on her home. If Susan attempts to rescind the contract, what is Bank's best argument?

5. Unconscionability

The common law defense of *unconscionability* tends to require unequal bargaining power, such as with *adhesion contracts* ("take it or leave it," no real choice but to contract and to accept all of its terms). It is a two-part analysis. The first question is whether enforcement of a contract would be so onerous on one party that it is just not fair. This is the substantive prong of the unconscionability test. The second question is whether one party has power over the other, whose choices are very limited and basically require acceptance. This is the procedural prong of the unconscionability test. Practically speaking, it is probably best to reverse the two prongs for purposes of clarity. The first question is whether, as between contracting parties, there is significantly disparate bargaining power, perhaps relating to level of education, lack of an automobile (and hence, options that require transportation), and similar. The second is the test whether it just does not seem fair under the circumstances. A travel-restricted senior shopping at the only grocery store in the neighborhood may be at a bargaining disadvantage for necessities such as milk. But an extra $.10 per half gallon compared to the price charged at larger grocery outlets does not seem to be particularly heinous.

For good measure, we excerpt one common law case and one sale-of-goods case. Are there any major differences? Does one seem easier to prove?

A. Common Law Unconscionability

KOHL v. BAY COLONY CLUB CONDOMINIUM, INC.

District Court of Appeal of Florida, Fourth District, 1981

398 So. 2d 865

HERSEY, Judge.

The non-final order appealed from here determined that the complaint seeking relief from the terms of a lease of recreational facilities (the rec lease) on grounds of unconscionability could be maintained in the form of a class action. It also determined that the condominium association (the association) and the joint owners of one condominium unit (the unit owners), plaintiffs below and respondents in this court, have standing to represent the plaintiff class. Brief

reference to the factual background is essential to an understanding of the legal issues thus raised.

Drexel Properties developed and marketed the Bay Colony Club Condominium; however, sale of some of the units was accomplished through outside real estate brokers. All sales were originated by the use of a form Purchase Agreement prepared by the developer. This form legally obligated the prospective purchaser to buy an apartment, to accept title in accordance with the terms of the Declaration of Condominium and related documents, to accept an assignment of an interest in a lease of recreational facilities, and to pay rent and expenses. At closing the purchaser received a Condominium Warranty Deed conveying to the purchaser legal title to a condominium unit and a proportionate undivided interest in the common elements. In addition the purchaser received an assignment of an undivided 1/640 interest in the rec lease and simultaneously became obligated to pay a proportionate part of the rent together with taxes and maintenance expenses in connection with the leased facilities. The association was not a party to the lease but was obligated by the documents to receive tax and maintenance payments from unit owners and to repair and maintain the recreational facilities from sums so received.

Each unit owner at closing pledged his interest in the condominium unit and his interest in the leasehold as security for the future payment of rent and taxes connected with the recreational facilities. The lease contains a provision for periodic cost-of-living rent increases.

Petitioners have an interest in this litigation as lessors of the recreational facilities (as successors in interest of the developer).

Respondent, the association, has an interest as the entity legally obligated to operate and maintain the leased facilities and to collect the necessary funds for this purpose from the unit owners.

Respondents, Albert Lucy and Rosalind Lucy, have an interest as joint owners of one of the condominium units.

Respondents, together, are alleged to have interests in common with all, or most of the other unit owners, sufficient to represent a class composed of the unit owners. In addition the association is alleged to have standing to represent a class composed of the condominium unit owners by virtue of statute.

There are 640 condominium units in the Bay Colony Club Condominium. Characterizing the owners of those units, first, according to their purpose in acquiring units, the record shows that a majority were purchased for resale, some were purchased as an investment for rental income, some as eventual retirement facilities, and some for present, permanent occupancy. Those same

purchasers may also be categorized depending upon the sophistication and expertise they had or hired in reviewing documentation and attending to the details for closing. The pattern is again amorphous. Some had attorneys, some were attorneys, and others had neither personal expertise nor professional guidance. Finally, unit owners differ depending upon their relationship to (a) the developer and (b) this litigation. It appears that only some 200 of the present unit owners originally purchased their units directly from the developer. Thus two-thirds of the hypothetical class composed of present owners dealt with and acquired their interest from third parties other than the developer. And of the 640 unit owners, approximately 14% admittedly have no interest in this litigation, either because they have settled their grievances or because they formally opted out of the class action.

Against that factual background it is necessary to determine whether a class action is appropriate where the cause of action rests in common law unconscionability, and if so, the composition of the class and further whether the class may be represented by the association.

Some recent Florida cases appear to support the trial court's affirmative response to the initial inquiry. Before attempting to apply those cases here a word about the concept of unconscionability is in order.

The authorities appear to be virtually unanimous in declaring (or assuming) that two elements must coalesce before a case for unconscionability is made out. The first is referred to as substantive unconscionability and the other procedural unconscionability.

In the modern progenitor of the common law concept of unconscionability, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C.Cir.1965), the court made the following analysis:
Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered into is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print or minimized by deceptive sales practices? (Emphasis supplied).

A very recent case, Bennett v. Behring Corp., 466 F.Supp. 689, 696 (S.D.Fla.1979), further refined this analysis:

> The dual requirements called for by Walker are the "absence of meaningful choice ... together with contract terms which are unreasonably favorable to the other party."

The first requirement under Walker, "absence of meaningful choice", is determined by analyzing the respective bargaining powers of the contracting parties, and the ability of the particular contracting party, in light of his education, intelligence, or lack thereof, to understand the terms of the contract. William v. Walker-Thomas Furniture Co., supra; Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775 (D.C. (App.) 1971).

This is referred to as "procedural unconscionability".

The onerous contract term from which a party seeks relief is commonly referred to as "substantive unconscionability". See, e. g., Fleischmann Distilling Corp. v. Distillers Company Limited, 395 F.Supp. 221 (S.D.N.Y.1975); see also, "In Defense of Unconscionability" 78 Yale L.J. 757 (1971); and "Consumer Protection Under Art. 2 of the UCC" 29 Ohio St.L.J. 689 (1968).

A case is made out for substantive unconscionability by alleging and proving that the terms of the contract are unreasonable and unfair. In the instant case it is alleged, in essence, that the terms of the recreational facilities lease are unreasonable and unfair. Since each member of the class is obligated under the identical lease and the terms of the lease have universal application, substantive unconscionability seems admirably suited to be redressed by class action.

Procedural unconscionability, on the other hand, speaks to the individualized circumstances surrounding each contracting party at the time the contract was entered into. This is thoughtfully discussed by the court in Johnson v. Mobil Oil Corp., 415 F.Supp. 264, 268 (E.D.Mich.1967):

The various factors considered by the courts in deciding questions of unconscionability have been divided by the commentators into "procedural" and "substantive" categories. See J. White & R. Summers, supra, at 118-30. Under the "procedural" rubric come those factors bearing upon what in the Weaver case was called the "real and voluntary meeting of the minds" of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question. The "substantive" heading embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable. According to J. White & R. Summers, supra, at 128:

> Most courts take a "balancing approach" to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability.

The impression created by the cases we have examined involving an analysis of application of the common law doctrine of unconscionability is that the prerequisites for a finding of procedural unconscionability are too individualized to permit of class action proceedings.

Nevertheless at least two Florida cases suggest to the contrary by way of dicta. In Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla.1977) and in Point East One Condominium Corp. v. Point East Developers, Inc., 348 So.2d 32 (Fla.3d DCA 1977), the respective plaintiffs individually and as class representatives were to be permitted, on remand, to attempt to state an amended claim based upon unconscionability.

This seeming dichotomy raises two possibilities: either the courts in those cases assume that it is possible to cast allegations of procedural unconscionability in the mold of a class action or that such allegations are unnecessary to state a cause of action for unconscionability. This latter is suggestive of the recognition of a new procedural vehicle for enforcing a cause of action based upon unconscionability. As a matter of fact such a procedural vehicle is implicitly embodied in Section 711.66(5)(e), Florida Statutes (1975), which provides:

> Any grant or reservation made by a declaration or cooperative document, lease, or other document, and any contract made by an association prior to assumption of control of the association by unit owners other than the developer, shall be fair and reasonable.

However, that statute is not applicable to the instant case since it operates prospectively only. Avila South Condominium Association, Inc. v. Kappa Corp., supra.

We are left, then, with the former hypothesis; that is, that a cause of action for common law unconscionability may be stated and sustained in a class action. This necessarily implies that both procedural and substantive unconscionability are susceptible under appropriate circumstances of being pled and proved in a class action.

We therefore next address the question of whether the complaint sufficiently alleges substantive unconscionability. There is nothing intrinsically unfair or unreasonable in a lease of recreational facilities to adjacent property owners as tenants which lease may contain an escalation of rent clause based upon some appropriate measure of increases in the cost of living. However, where

that lease requires payment of taxes and expenses in perpetuity and such payment is exacted from unit owners who may never avail themselves of the opportunity to utilize the rented facilities then the document is at least suspect. We duly note that the original lessor-developer obviously incurred expense in purchasing the land and constructing the facilities. All subsequent expense is borne by the lessees. Once the developer recoups his investment and a reasonable profit the burden should be on the developer to establish fairness and reasonableness when challenged by a tenant with standing. The term “with standing” in the context of common law unconscionability requires that, in addition to “standing” in the traditional sense, the tenant must be one in a position to allege and prove procedural unconscionability.

We conclude therefore that substantive unconscionability is susceptible of allegation and proof in a class action bringing into question the validity or continued enforceability of a lease of recreational facilities where the element of coercion regarding rental and other payments is present. It is further our conclusion that the amended complaint meets the test in this regard.

Finally we address the question of pleading and proving procedural unconscionability. To meet the threshold test of adequacy the allegations of procedural unconscionability must clearly demonstrate the absence of meaningful choice on the part of the plaintiff. Ordinarily this requires an examination into a myriad of details including plaintiff's experience and education and the sales practices that were employed by the defendant or his predecessor-assignor. However, the basic concept is “an absence of meaningful choice.” While we foresee monumental obstacles of proof of such an allegation (which is a legal conclusion only) in a class action setting, we are not prepared to hold that the allegations of the amended complaint are per se insufficient. We note that we are not called upon here to determine evidentiary questions.

Limiting our holding to the narrow legal issue of whether the amended complaint states a cause of action for unconscionability which may be maintained as a class action, we affirm the order of the trial court denying the motion to dismiss.

Petitioner questions, inter alia, the standing of the association comprised of the unit owners, to represent the class. The association was not a party to the lease. However, we construe Rule 1.221, Florida Rules of Civil Procedure, as authorizing the association to maintain actions on behalf of all unit owners concerning any matter of common interest, including, but not limited to, the common elements. See Imperial Towers Condominium, Inc. v. Brown, 338 So.2d 1081 (Fla. 4th DCA 1976). Such is the case here.

Other questions raised as to composition of the plaintiff class except as determined by the order on appeal are premature and our consideration must

await appeal from a final judgment in which the rights of the class (and perhaps various members of the class) have been adjudicated by the trial court.

The order appealed from is affirmed in all respects.

AFFIRMED.

B. Sale-of-Goods Unconscionability

CAPITAL ASSOCIATES, INC. v. HUDGENS

District Court of Appeals of Florida, Fourth District, 1984

455 So. 2d 651

HURLEY, Judge.

Capital Associates, Inc. (Capital) sued Jo B. Hudgens for breach of a lease agreement. The trial court entered final judgment in favor of Hudgens on ground that Capital failed to offer sufficient proof on the material allegations of its complaint. Capital appeals, contending that the lower court's decision is in error because it introduced uncontradicted evidence on every element of its claim. We agree that the record contains substantial competent evidence to support Capital's claim, but the record also suggests that the trial court denied recovery because it found that the lease agreement was unconscionable. Even so, we must remand for further proceedings because the trial court failed to afford Capital "a reasonable opportunity to present evidence as to [the lease's] commercial setting, purpose and effect ...." § 672.302(2), Fla.Stat. (1983).

The contract between Capital and Hudgens is an equipment lease dated June 30, 1981, pursuant to which Hudgens rented a space invader video game, a pool table and a juke box from Capital. Under the terms of the lease, Hudgens was to make monthly payments of $459.85 for 36 months. The lease expressly provides that it is "non-cancellable" for the 3 year term; that the lessee is to acquire no right to purchase or otherwise acquire title to the equipment unless otherwise agreed in writing, and that upon default (defined in part as failure to pay any rental when due for a period of five days), the lessor may declare the entire amount of unpaid rent for the balance of the term immediately due and payable. The latter acceleration clause is embedded in fine print on the reverse side of the contract.

Hudgens made payments under the lease through April, 1982. On April 23, 1982, she called Capital and requested that the equipment be removed, and

All American Vending Corp. was sent to pick up the equipment on that same day. A “Notice of Intent to Sell” dated April 23, 1982, was sent to Hudgens, advising her that Capital intended to sell the equipment at a private sale because of the breach, but that Hudgens could acquire title to the property by tendering the sum of $14,045.51 at any time before the sale.

Capital subsequently solicited bids for the equipment. After receiving three bids, it accepted the highest bid of $1,000 from the vendor, All American Vending Corp. Next, Capital instituted this action against Hudgens to recover the deficiency—$12,093.52, representing the balance of rental payments, state sales tax, late charges and personal property tax, as well as attorney's fees incurred in the collection proceeding. At trial, Hudgens admitted entering the lease and receiving the equipment. However, she testified that at the time of execution of the lease agreement, agents of All American Vending Corp. told her that she was signing a month-to-month lease which she could cancel at her option. She also stated that she was intoxicated at that time.

As an initial matter, we find that the equipment lease at issue here is subject to the provisions of Article 2 of the Uniform Commercial Code, even though that Article does not expressly apply to leases. Section 672.102, Florida Statutes (1983), provides that “[u]nless the context otherwise requires, this chapter applies to transactions in goods ....” Section 672.105(1), in turn, defines goods as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale ....” We hold that the term “transaction” in section 672.102 is broad enough to encompass leasing agreements and that the pieces of equipment at issue here are movable “things” and thus meet the definition of “goods” set forth in section 672.105. In short, this lease transaction is subject to Article 2 of the U.C.C. and, therefore, the Code section governing unconscionable contracts or clauses, section 672.302, is applicable. *See All States Leasing Co. v. Top Hat Lounge, Inc.*, 649 P.2d 1250 (Mont.1982); *Walter E. Heller & Co. v. Convalescent Home of the First Church of Deliverance*, 49 Ill.App.3d 213, 8 Ill.Dec. 823, 365 N.E.2d 1285 (1977).

Section 672.302, Florida Statutes (1983), provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its

> commercial setting, purpose and effect to aid the court in making the determination.

Under the foregoing statute, a trial court has authority to declare any provision of a contract void on its own initiative if it finds the clause unconscionable after holding the requisite hearing.[1] As indicated, however, the trial court in this case failed to hold the required hearing and, thus, it could not make a definitive finding on unconscionability. This is not to say, however, that the trial court was unjustified in its initial concern. Indeed, the record below contains prima facie evidence of unconscionability. Enforcement of the acceleration clause would allow Capital to recover unaccrued and unearned rent in an amount exceeding $12,000.00 for equipment which it resold for $1,000.00.[2] Since the clause was embedded in a page of fine print and Hudgens was an uncounseled layman, the trial court could easily conclude that the clause is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. This would permit invocation of section 672.302 to avoid oppression and unfair surprise. *See* Uniform Commercial Code Comment, § 672.302, Fla.Stat.Ann. (1978*); Fairfield Lease Corp. v. Umberto*, 7 U.C.C. Rep.Serv. (Callaghan) 1181 (N.Y.Civ.Ct.1970); cf*. Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264 (E.D. Mich.1976). *See generally*, Davenport, Unconscionability and the Uniform Commercial Code, 22 U.Miami L.Rev. 121 (1967).

Since section 672.302(2), Florida Statutes (1983), mandates that whenever unconscionability appears to be a defense to enforcement of a contract or clause, “the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making its determination,” and because Capital never had an opportunity to defend the commercial reasonableness of its contract, we must remand this cause to the circuit court with instructions to hold the evidentiary hearing contemplated by section 672.302(2).

REVERSED AND REMANDED.

DOWNEY and GLICKSTEIN, JJ., concur.

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[1] We also note that unconscionability is a good defense to a contract action under Florida case law. *See, e.g., Peacock Hotel v. Shipman*, 103 Fla. 633, 138 So. 44, 46 (1931), where the Supreme Court stated that when “one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, ... a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness.” *See also Point East One Condominium Corp. v. Point East Developers, Inc.*, 348 So. 2d 32 (Fla.3d DCA 1977).

[2] There is some indication in the record that the trial court attached significance to this factor. In addressing plaintiff's attorney, he stated “Does that strike you as curious, counsel, that

here's some equipment that isn't a year old and they get $1,000 for it high bid, and curiously enough from the vendor?"

Problem 24-7

Anthony was recently evicted from his apartment and is desperately searching for another place to live. Oscar, who owns an apartment complex, offered to rent Anthony a 500-square-foot studio apartment. The terms of the lease would require Anthony to be responsible for a minimum lease term of five years. Anthony agrees to the terms of the lease contract, primarily because he could not find any other affordable place to live. He immediately moved in. If Anthony receives a job offer in another state after three years in Oscar's apartment complex, will he be able to break the lease without paying for the remaining two years? Why or why not? (Advice: there are no facts indicating a problem with formation of the lease agreement, and therefore this is *not* a formation question).

Problem 24-8

Owen owns a paving company that paves driveways for houses. Alex needs to have her driveway repaved but does not know much about the costs of the construction. Alex contacts Owen's paving company and asks about the pricing of the paving project that her home requires, specifically stating that she is naive to how much it should cost. In an attempt to take advantage of the situation, Owen quotes Alex at $10,000, which is $6,000 more than an ordinary project of that size would cost. Alex agrees to the price and the parties enter into a valid contract. If Alex discovers the standard price charged by all similar contractors in that area for similar jobs, can she prevent the enforcement of her contract with Owen? On what basis(es)?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 24

72. The difference between lack of formation and a defense to enforcement of a contract
73. The defense of infancy, when it may be lost, and when it may not, for public policy reasons, be available in the first place
74. The two-part analysis of unconscionability, i.e., the procedural aspects and the substantive ones

SUGGESTED EXERCISE(S)

1. Use the elements from Note 2, of this Chapter on *mutual mistake* and come up with factual situations that would or would not satisfy the legal

requirements. Discuss examples to develop a good sense of which examples work and which fail to fit the requirements.

2. Research the concept of *emancipated minors* and contemplate how it fits within the rules on the defense of infancy. A good starting point would be FLA. STAT. § 743.01 *et seq.* (2017).

CHAPTER 25: PRE- & DURING-FORMATION "FAULT" DEFENSES

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This Chapter also addresses problems that arise during the formation phase of a contract that make the contract either unenforceable as *void* (as with certain forms of illegality) or as *voidable* (the "innocent" party may enforce or request denial of enforcement of the contract at his/her/its option). Some contractual purpose, such as murder for hire, can never be legally sanctioned and therefore such contracts are *void*. The same has been true, historically, for contracts related to illegal gambling. Other situations are not so grave and may permit at least one party, the "innocent" one, to enforce the terms of the agreement. Perhaps someone with a mental impairment actually makes a great bargain and wants to keep it. One would not want a predatory contracting party to get out of a bad contract on the basis that the *other* party was mentally impaired, would one? As in the last Chapter, the defenses in this Chapter 25 involve some factor that precedes or coincides with contract formation. Problems that arise *after* formation will be addressed in Chapter 26.

1. Illegality

One would hope that time and experience would have taught even criminals not to enter into contracts for illegal purposes, especially in writing. (*Imagine*

a hitman arguing his way out of a criminal conspiracy by asserting the Statute of Frauds defense...). Perhaps as a tribute to the creativity of the criminal mind, however, people find ways to contract for things that appear legal, at least facially. Noteworthy in the *Lopez* case is the deft handling, in contract and tort (i.e., the insurance company's duty of care), of what could very well have been a criminal proceeding had it been brought in a criminal court. The level of illegality is a factor, at least in potential recovery.

A. Illegal Purposes

LOPEZ v. LIFE INS. CO. OF AMERICA

District Court of Appeals of Florida, Fourth District, 1981

406 So. 2d 1155

HERSEY, Judge.

Jim F. Lopez appeals from an order dismissing his complaint with prejudice. Because of the unique circumstances involved in this case and the novelty of the legal issues raised, we set forth the complaint here in its entirety.

> 1. This is an action for damages in excess of Two Thousand Five Hundred ($2,500.00) Dollars.
>
> 2. At all times material hereto the Plaintiff was a resident of Palm Beach County, Florida; further at all times material hereto the Defendant was and is a foreign corporation, authorized and doing business in the State of Florida.
>
> 3. Between the years 1974 and 1977, the exact dates of which are unknown to Plaintiff but known to Defendant, the wife of the Plaintiff, to-wit: Gladys M. Lopez, contracted for life insurance coverage on her husband's life with the Defendant for policies containing double indemnity clauses in the following amounts:
>
> (a) Policy No. 1369397, face value $55,000.00, double indemnity for accidental death;
>
> (b) Policy No. 1499005, face value $50,000.00, double indemnity for accidental death;
>
> (c) Policy No. 1214017, face value $20,000.00, double indemnity for accidental death; and

(d) Policy No. 1218774, face value $5,000.00, double indemnity for accidental death.

Therefore, the above policies had a face value of $130,000.00, but for an accidental death of the Plaintiff, the beneficiary, Gladys M. Lopez, would obtain the sum of $260,000.00. Gladys M. Lopez obtained the signature of her husband, the Plaintiff, on various applications by stating that she was obtaining accidental health insurance for him in case he would become injured, and the Plaintiff had no idea or suspicion that he was applying for life insurance.

4. At this time, the family net worth was zero and his income as a chef was approximately $9,000.00. The monthly premiums on the above life insurance policies amounted to about $622.00.

5. Several months prior to May 2, 1977, Mr. Lopez, the Plaintiff, overheard his wife and her brother-in-law plotting to kill him and he immediately called his insurance agent, who was an agent for the Defendant and reported overhearing a discussion about his death to collect the Life of Georgia life insurance and requested that any life insurance he might have had be cancelled.

6. The defendant negligently did not investigate these complaints and negligently failed to cancel the life insurance on the life of the Plaintiff.

7. On May 2, 1977, the Plaintiff was kidnapped by his wife, Mrs. Lopez, and her brother, James Miller, along with William R. Meloy and Henry A. Walters. These abductors took the Plaintiff in the back of the truck to near 20 mile bend and they bound his hands, forced whisky down his throat and were about to drown him when a deputy sheriff discovered him and rescued him prior to his death.

8. The defendant was negligent in writing an excessive amount of whole life insurance coverage plus double indemnity on the life of JIM F. LOPEZ considering the income of the family.

9. The Defendant did not make a proper investigation into the background and income of the Lopez family to determine whether or not they were financially able to carry such an excessive amount of insurance coverage and if they had exercised a reasonable caution in such an investigation, they would have learned that the premiums almost equalled the income of the family, which in turn should have made the Defendant suspicious

that this excessive life insurance was done for the express purpose of killing Mr. Lopez and collecting his life insurance.

10. The Defendant further was negligent in failing to take any action to investigate the warning of the Plaintiff that the beneficiary of these policies was entering into a conspiracy to take his life to collect his insurance.

11. As a result of the attempt on his life on May 2, 1977, the Plaintiff was injured, necessitating medical expenses and a permanent injury.

12. Defendant's conduct as aforedescribed, was fraudulent, oppressive, malicious, and outrageous towards Plaintiff, with conscious disregard of Plaintiff's safety and with the intention of benefiting Defendant financially and done with the intent of causing, or with willful disregard to the probability of causing, severe physical and emotional distress to Plaintiff.

13. The aforesaid acts of the Defendant did, in fact, cause Plaintiff to suffer great mental anguish, upset and harm.

14. As a direct and proximate result of the aforementioned acts of Defendant, Plaintiff became upset and nervous and disturbed in body and in mind. Plaintiff has also suffered great mental and physical anguish, all to their damage in excess of compensatory damages of Twenty Five Hundred ($2500.00) Dollars, plus punitive damages in excess of One Million ($1,000,000.00) Dollars.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount in excess of Two Thousand Five Hundred ($2,500.00) Dollars, together with punitive damages in an amount on (sic) One Million ($1,000,000.00) Dollars, plus costs, interest and attorneys' fees, and further, Plaintiff demands a trial by jury.

Before attempting to assess the actionability vel non of the alleged acts and omissions of appellee, insurer, it seems appropriate to orient the issues within the applicable procedural law. In doing so, we dispose of several arguments advanced by appellee in support of its position.
A motion to dismiss for failure to state a cause of action is addressed solely to the allegations of the complaint. *Geer v. Bennett*, 237 So.2d 311 (Fla. 4th DCA 1970). Those allegations well pleaded must be taken as true for purposes of determining whether the motion should be granted. Hammonds v. Buckeye Cellulose Corp., 285 So.2d 7 (Fla.1973). The sole question to be determined by the trial court is whether or not the complaint states a cause of action. *Rice*

v. White, 147 So.2d 204 (Fla. 1st DCA 1962). This is a question of law. *Geer v. Bennett, supra*.

The insurance company argues first that appellant's wife had an insurable interest, that appellant consented to issuance of the insurance and that, consequently, it cannot be liable under these circumstances. The complaint, on the other hand, alleges in pertinent part: “the Plaintiff (Appellant/insured) had no idea or suspicion that he was applying for life insurance.” Whether appellant knowingly executed applications for life insurance, as suggested by appellee, or was misled by his wife to believe that he was applying for accidental medical health insurance, as suggested by the complaint, is a factual issue not properly before the court for determination on a motion to dismiss. For purposes of this appeal we are bound to assume that the insured was misled and that there was no consent to issuance of insurance on his life.

Appellee next argues that the intervening criminal act involved here was not foreseeable, “especially ... when the insurer has used reasonable care in issuing the policy.” Reserving discussion of foreseeability for the present, we point out again that a factual determination is called for and assumed by appellee's reliance on due care. The allegations of the complaint could, under no interpretation, be said to establish as a matter of law that the insurer proceeded with reasonable care under the circumstances.

We are thus led inexorably to the crucial issue involved in this appeal: whether the insurer owed a duty of care to the insured and whether that duty was breached to the damage of the insured. The presence and complexity of collateral issues will appear from our subsequent discussion of the central and determinative question.

The complaint alleges breaches of several duties. We find it necessary to examine only one.

Florida law requires that an individual contracting for insurance on the life of another have an insurable interest. § 627.404 Fla.Stat. (1979). The obvious purpose of that requirement is to prevent so-called “wagering” contracts. It is assumed that the existence of such an insurable interest will counterbalance any temptation that might otherwise exist for a beneficiary to murder the insured for the insurance proceeds. That assumption may be ill-founded, however, if the amount of the proceeds vastly exceeds the value of the insurable interest. We find neither statute nor case law in Florida addressing the question of whether consent of the insured is a prerequisite to the obtaining of insurance by another having an insurable interest in the insured's life. In view of the paramount interest of the insured in the continuance of his own life it would appear that obtaining his consent before issuing a policy that might well constitute a motive for murder would not be an unreasonable requirement. At least one jurisdiction has imposed such a condition precedent.

In *Ramey v. Carolina Life Insurance Co.,* 244 S.C. 16, 135 S.E.2d 362 (1964), an insured sued an insurer for injuries sustained when his wife attempted to murder him by arsenic poisoning. The insurer had issued a life insurance policy, without the insured's knowledge or consent, naming the insured's wife as beneficiary. The wife had forged the insured's name on the application and such forgery was known to the insurer. In holding that the insured could maintain a cause of action for negligent issuance of the policy, the court stated that an insurer has a duty to use reasonable care not to issue a policy of life insurance in favor of a beneficiary who has obtained such policy without the knowledge or consent of the insured, regardless of the presence of an insurable interest. We expressly approve the rule enunciated in *Ramey*.

Thus, appellee had a duty, at the time application was made for insurance of appellant's life, to use due care that such application was being made with the knowledge and consent of the insured. We take the term "knowledge and consent" to mean an informed consent by one who understands the nature of the entire transaction. Thus such factors as forged applications, signatures obtained under false pretenses and the like, become questions of fact to be determined at the appropriate stage of the litigation. At least in the present case the allegations of the complaint do not invite disposal of the issue on motion to dismiss.

Concluding this aspect of our examination of the issue we hold that an insurer has a duty to its insured not to issue a life insurance policy, even to one having an insurable interest, without the knowledge and consent of the insured.

Assuming, arguendo, that no breach of duty occurred at the time the life insurance policy was originally applied for and issued, there remains the issue raised by the allegation of a subsequent breach of that same duty.

A life insurance policy is void *ab initio* if it is shown that the beneficiary procured the policy with an intention to murder the insured. *New England Mutual Life Ins. Co. v. Null*, 605 F.2d 421 (8th Cir. 1979). Thus an insurer has the right to claim that a policy so procured is unenforceable, thereby avoiding payment of benefits. The logical correlative duty imposed on an insurer, if it later learns of the illegal purpose of the insurance contract, requires that the contract be immediately cancelled as being void and unenforceable so as not to be unjustly enriched by future premium payments and, more importantly, so as not to endanger the life of the insured.

Such circumstances are alleged in the complaint here. The finder of fact may ultimately determine that the insurer did not breach its duty in this regard because it took certain actions or because it could not legally cancel the policy on these facts or on some other basis, but these are not questions properly before the court on the motion to dismiss.

Appellee takes the position that even if the insurer has the duty we have discussed at length, the criminal actions which damaged appellant do not give rise to a cause of action against appellee for two reasons.

First, appellee contends that the intervening criminal act breaks the chain of causation between the original actor's negligence and the resulting injury. This is seen as a function of foreseeability which, in turn, relates directly to proximate cause. Thus, if the criminal act of attempted murder was reasonably foreseeable as a consequence of issuance of the policy on appellant's life without his knowledge and consent, then issuance of the policy was a proximate cause of appellant's peril and consequent damages. The insurance company insists that the intervening criminal act was not reasonably foreseeable. Our previous discussion of policy and the allegations of the complaint would indicate to the contrary. Be that as it may, however, foreseeability is a question for the finder of fact not appropriately disposed of by motion to dismiss unless the allegations themselves are deficient in stating the cause of action. *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520 (Fla.1980).

Second, appellee relies on *Claycomb v. Eichles*, 399 So.2d 1050 (Fla. 2d DCA 1981) for the proposition that damages may not be recovered for mental anguish or physical injury resulting from emotional stress which is caused by negligence where there is no physical impact. We neither subscribe to nor repudiate that proposition here. We simply refer again to the complaint which alleges that appellant was tied up in the back of a truck while whiskey was poured down his throat. Either or both of those occurrences constitute a sufficient “physical impact” to sustain the complaint against attack on this basis.

Accordingly, we reverse the order which dismissed appellant's complaint with prejudice and remand this cause for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

LETTS, C. J., and MOORE, J., concur.

ON REHEARING

PER CURIAM.

We adhere to our original opinion but certify to the supreme court the following question as one of great public interest:

> Whether an insurer issuing a life insurance policy can be liable in tort to the insured where the policy beneficiary attempts to murder the insured in order to collect the policy benefits?

We pose the question in the language requested by counsel recognizing that it is overbroad, but confident that the language of our original opinion will bring it into appropriate focus.

LETTS, C. J., HERSEY and DELL, JJ., concur.

SPIRO v. HIGHLANDS GENERAL HOSP.

District Court of Appeals of Florida, Second District, 1986

489 So. 2d 802

RYDER, Chief Judge.

Victor E. Spiro, D.D.S., appellant, is a dentist licensed to practice in Florida. The appellant has special training in the field of general, nondental anesthesia but is not licensed for medical practice.

In April 1983, the dentist applied for staff privileges as a general anesthesiologist with appellee Highlands General Hospital. The Hospital questioned whether a dentist with an educational background in anesthesiology is qualified to practice general, nondental anesthesia in a hospital setting without a medical license. The Hospital inquired with the Florida Board of Dentistry regarding this eligibility question. The Board's attorney informed the Hospital that there was no law permitting or prohibiting dentists as a class from practicing nondental anesthesiology and that the Board would issue declaratory statements permitting this practice in appropriate cases. Both the Hospital and Dr. Spiro interpreted this answer from the Board to mean that it was not illegal for the dentist to practice general, nondental anesthesia. Without questioning the jurisdictional authority of the Board of Dentistry, the parties relied upon this Board response and entered into a contract.

The contract established that the dentist would provide anesthesia services on behalf of the Hospital in return for staff privileges. The contract did not confer upon the appellant hospital employee status, nor a salary. However, as an inducement to get the dentist to relocate to Highlands County, the Hospital guaranteed him a gross income of $100,000.00 for the first year.

The agreement between the parties was conditioned upon the dentist complying with Hospital bylaws which, among other things, required that Dr. Spiro as a staff member obtain appropriate licensure for his practice of

general anesthesia. It was also understood that Dr. Spiro would have to have a medicare provider number for hospital payment reimbursement.

Dr. Spiro began anesthesia services in June 1983. However, Blue Cross/Blue Shield denied the Hospital's request for medicare reimbursement for the dentist's services as a general anesthesiologist for lack of proper medical licensing. Again, the Board of Dentistry was contacted for their help in resolving this matter. The Board replied by sending a copy of a declaratory statement they had issued regarding another dentist, Dr. Hunter, which stated that there was nothing in the Dental Practice Act which made it illegal for a dentist to practice general anesthesia in Florida.

Nevertheless, Blue Cross/Blue Shield continued to refuse to provide Dr. Spiro a provider number for reimbursement purposes. Consequently, it was evident that Dr. Spiro had a licensure problem. In September 1983, the Hospital requested that Dr. Spiro refrain from taking any other cases until the problem was corrected and he had his medicare provider number. During the time of the appellant's anesthesia practice, there were no eventful occurrences.

In October, Dr. Spiro requested and received a declaratory judgment from the Board of Dentistry regarding this matter. The judgment stated that there was nothing in the Florida Dental Act which prohibited a qualified dentist from practicing general anesthesia. However, it did not make an affirmative authorization for Dr. Spiro to practice anesthesia.

In February 1984, without obtaining a medicare provider number, Dr. Spiro filed a three-count complaint against appellee Hospital. The complaint petitioned for damages and other relief based upon promissory estoppel, breach of contract, and quantum meruit. Subsequently, an amended complaint was filed adding another count, Count 4, which requested the reinstatement of appellant's staff privileges.

The circuit court held that a dentist may not practice that branch of medicine known as general anesthesiology in a hospital setting, and granted a summary judgment of dismissal as for Count 4, the request for staff privileges reinstatement. Further, the circuit court issued an order ruling that the Hospital acted properly when it prohibited Dr. Spiro from continuing his unlawful practice of general anesthesia. The circuit court found, based on *Rush v. City of St. Petersburg,* 205 So.2d 11 (Fla. 2d DCA 1967), that the contract in question was illegal because it sanctions the unauthorized practice of medicine. Consequently, neither party breached the void contract and relative damages could not be obtained. The court also determined that neither party was unjustly enriched at the expense of the other so quantum meruit was not a recovery basis. Finally, the court ruled that since the purpose of the contract had been frustrated by the determination of contract illegality, there could be no entitlement of damages.

Dr. Spiro appeals the summary judgment dismissing Count 4 and the order which denied damages. After careful review, we affirm the circuit court's rulings.

A dentist cannot practice the art of medicine without a medical license, despite a specific training in a field of medicine, anesthesiology in this case, which is, nevertheless, short of the required training necessary to obtain a medical license. The appellant does not have a medical license and, therefore, cannot practice anesthesia in a medical form.

The legislature and the Board of Medicine have determined that, regardless of one's expertise or qualifications, one must be a licensed physician in order to practice medicine. The Medical Practice Act establishes in sections 458.311 and 458.313, Florida Statutes (1985), the minimum requirements for acquisition of a medical license. The purpose of these minimum requirements is set forth in section 458.301, which states that:

> The Legislature recognizes that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners. The Legislature finds further that it is difficult for the public to make an informed choice when selecting a physician and that the consequences of a wrong decision could seriously harm the public health and safety. The sole legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meet minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

It is evident that the anesthesiology desired to be practiced by the appellant is nondental in nature. Section 466.003(3), Florida Statutes (1985), explicitly limits the practice of dentistry to "the healing art which is concerned with ... conditions within the human oral cavity and its adjacent tissues and structures...."

Moreover, there are limitations placed on dentists regarding the administration of anesthesia as set forth in chapter 21G-14.04(4), Florida Administrative Code. This rule restricts the dental practitioner's administration of anesthesia to that which is dental related. Further, section 466.017(1), Florida Statutes (1985), provides that a dentist "... shall have the right to ... administer general or local anesthesia or sedation...." which must be read in the context of the express limitation on a dentist's practice, *i.e.,* the human oral cavity and its adjacent tissues and structures. When read in context, it is clear that section 466.017 merely relates to the nature of anesthetic agents a dentist may administer in the course of his dental

practice. Thus, in light of section 466.003(3), the use of anesthesia by a dentist is necessarily limited to the practice of dentistry.

* * *

In that it is illegal for a dentist to practice general, nondental anesthesia and the contract in question requires such, the contract is illegal by nature. Therefore, the trial court's denial of contract damages was proper. "When a statute declares it to be unlawful to perform certain acts without first obtaining a license permitting the performance of such acts and imposes a penalty for the violation thereof, or where the statute prohibiting certain acts is enacted for the protection of the public, contracts made for the performance of such acts without first obtaining the appropriate license, are unenforceable." *D & L Harrod, Inc. v. U.S. Precast Corp.,* 322 So.2d 630, 631 (Fla. 3d DCA 1975). Further, "there is no legal remedy for that which is illegal itself." *Id.* at 631.

Therefore, appellee could not legally staff the appellant for anesthesia services due to the inadequate licensing of appellant, which made the contract illegal, *ab initio.* It frustrated the very purpose of the contract, which was to have the appellant perform such services in consideration of Hospital staff privileges. Because the contract is unenforceable due to its illegality, the appellee could not have breached the contract and, therefore, the appellant cannot recover any damages relative to a breach.

As for the promissory estoppel and quantum meruit arguments, they are meritless and need not be addressed.

We affirm the trial court's judgment on both granting summary judgment as to appellant's Count 4, so as to dismiss appellant's request for reinstatement of staff privileges, and the judgment denying appellant's request for contract damages.

B. Not-So-Illegal Purposes

States often make distinctions between the morally reprehensible purposes that contracts may take (e.g., murder for hire, gambling, trafficking in poisons, etc.) on the one hand, and those that are technically wrong but quite not as morally reprehensible. In the case of the latter, though the contract may not be enforced, there is the possibility of recovery based on equitable theories such as for *quantum meruit* or restitution (addressed in Chapter 12). In either case, the contract *itself* is not enforceable, but for performances where the illegality is more benign, some recovery may still be awarded. The Restatement (Second) Contracts provides:

§ 181. Effect of Failure to Comply with Licensing or Similar Requirement[58]

If a party is prohibited from doing an act because of his failure to comply with a
licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if

(a) the requirement has a regulatory purpose, and

(b) the interest in the enforcement of the promise is clearly outweighed by
the public policy behind the requirement.

CASTRO v. SANGLES

District Court of Appeals of Florida, Third District, 1994

637 So. 2d 989

SCHWARTZ, Chief Judge.

The Castros agreed with Sangles, an unlicensed contractor, to build a duplex on their property
for the apparently low sum of $42,500.00. Mr. Castro then himself "pulled" the building permit from the Dade County authorities on the knowing and sworn-to misrepresentations that he was the "owner-builder" and that no contractor was involved. When Sangles's construction proved unsatisfactory, the Castros brought this action for his breach of the agreement. The case was referred to a General Master, who recommended dismissal of the action on the ground that the alleged agreement was unenforceable under section 489.128, Florida Statutes (1991).[1] The Castros now appeal from a final judgment confirming that report. We affirm.

In our view, the conclusion that the action is barred by the clear terms of the statute that a contract like this one is "unenforceable in law," § 489.128, is entirely correct. It is, of course, the general rule that no action may be maintained on an "illegal" agreement. L*ocal No. 234 v. Henley & Beckwith, Inc.*, 66 So.2d 818, 823 (Fla.1953) ("[A] contract against public policy may not be made the basis of any action either in law or in equity."); *Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 587-88, 48 So. 19, 25 (1908) (contracts violating public policy designed for public welfare are illegal and

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will not be enforced by the courts); *D & L Harrod, Inc. v. U.S. Precast Corp.*, 322 So.2d 630, 631 (Fla. 3d DCA 1975) ("There is no legal remedy for that which is illegal itself"; carrier who hauled goods without license in violation of statute enacted for protection of public denied recovery under contract). It is true, as the plaintiffs point out, that this doctrine has sometimes not been applied when, as here, one dealing with another who is not properly licensed attempts to recover for the non-licensee's own breach of contract. *E.g., Cooper v. Paris*, 413 So.2d 772 (Fla. 1st DCA 1982) (permitting recovery of commissions paid to unlicensed real estate broker). *See generally* Annot., Recovery Back of Money Paid to Unlicensed Person Required by Law to Have Occupational or Business License or Permit to Make Contract, 74 A.L.R.3d 637 (1976). These authorities, however, do not apply to this situation.

1. First, these cases are founded on the fact that the statute in question was designed to protect a class of consumers from the perils of dealing with an unlicensed contractor, so that it would be contradictory to deny an innocent victim the right to recover against that wrongdoer. Cooper, 413 So.2d at 773-74; 11 Fla.Jur.2d Contracts § 83 (1979). This underlying premise is pointedly not true of section 489.128. As its preamble states,[2] the statute was enacted to safeguard the public as a whole from the activities of incompetent contractors. The effect of the combination of Hurricane Andrew and shoddy construction practices not only upon the owner himself, but his neighbors and the entire community, is too recent a memory to require emphasis of the fact that violations of the statute present a real danger, as the legislature foresaw, to the general public. Hence, the general rule forbidding reliance on such a contract directly applies.

2. Just as important, one may recover upon an apparently illegal contract only if he himself has not been guilty of wrongdoing-that is, as we pontifically say in the law, that he is not in pari delicto with the actual malefactor. *Local No. 234*, 66 So.2d at 821; *Cooper*, 413 So.2d at 773. Again, that is not the case here.[3] As General Master Farrell properly stated:

Plaintiff cites *Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 48 So. 19, 25 (1908), declaring:

> "The courts will not in general aid either party to enforce an illegal agreement, but will leave the parties where they place themselves with reference to such illegal agreement, except where the law or public policy requires action by the courts, or where the parties are not in pari delicto..." [E.S.]

The plaintiff, however, disregards or minimizes the fact that plaintiff, Juan Castro, was clearly in pari delicto since it was he who, for his own financial gain, made a specific representation to official authorities, under oath, that the building permit was expressly sought by the owner as builder thereby

disavowing the presence of the “general contractor” against whom he now seeks to enforce an alleged express oral agreement.

We entirely agree that Castro's improper securing of the building permit-which was contrary not only to his sworn affidavit and the Metropolitan Dade County Code,[4] but to Chapter 489 itself[5]-precluded his recovery.[6] We cannot allow one to invoke the judicial process when, for his own financial benefit, he has participated in the very activity the law precludes, with the resulting danger that the law seeks to avoid. See Inter-Continental Promotions, Inc. v. Miami Beach First Nat'l Bank, 441 F.2d 1356, 1361 (5th Cir.1971) (participants in a boxing match who knowingly engaged in “subterfuge” to bring event within statutory exception, barred from recovery against promoters of illegal fight), cert. denied, 404 U.S. 850, 92 S.Ct. 85, 30 L.Ed.2d 89 (1971).

Affirmed.

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[1] **489.128 Contracts performed by unlicensed contractors unenforceable**.-As a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain his license in accordance with this part shall be unenforceable in law, and the court in its discretion may extend this provision to equitable remedies. However, in the event the contractor obtains or reinstates his license the provisions of this section shall no longer apply.

[2] **489.101 Purpose**.-The Legislature recognizes that the construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services. Therefore, it is necessary in the interest of the public health, safety, and welfare to regulate the construction industry.

[3] *See Kirkendall v. Heckinger*, 105 Mich.App. 621, 628 n. 2, 307 N.W.2d 699, 703 n. 2 (1981) (“Query whether [property owners] were in pari delicto with defendants in violating ... the residential builders licensing act, or at least in delicto [,]” where plaintiffs obtained building permit which could not be issued to defendant as an unlicensed contractor.).

[4] The Code provides:

Sec. 10-5. Qualifications for obtaining permits.

....

(2) A sole owner may make application for permit, supervise and do the work in connection with the construction, maintenance, repair, alteration and addition to a single-family or duplex residence for his own use and occupancy and not intended for sale. He shall obtain all required permits for such work, and as a prerequisite to obtaining permits, he shall satisfy the Building Official that he has the ability and knowledge of the South Florida Building Code to do such work in the trades involved.

A sole owner, may in addition, personally install, repair, alter, or add to the plumbing, electrical, mechanical and gas systems in his own single-family or duplex residence for his own use and occupancy and not intended for sale.... Such installation shall be made by the

owner for himself and on his own premises, without compensation from others, and he shall not employ anyone to assist with such installations.
Metropolitan Dade County, Fla., Code § 10-5(a)(2) (1992).

[5] **489.103 Exemptions**.-This part does not apply to:
....
(7) Owners of property when acting as their own contractor and providing all material supervision themselves, when building or improving farm outbuildings or one-family or two-family residences on such property for the occupancy or use of such owners and not offered for sale or lease.... This subsection does not exempt any person who is employed by such owner and who acts in the capacity of a contractor.... To qualify for exemption under this subsection, an owner must personally appear and sign the building permit application. [ ].

Note

The language of the Restatement (Second) Contracts § 181 is a negative pregnant of sorts – as it pronounces one thing, it implicitly affirms its opposite. Thus, where a party lacks a necessary license and the lack of said license is significantly against public policy, then that party cannot recover. However, and cases as well as examples provided in the Restatement (Second) are in full accord, the lack of a license often means that the contract is not enforceable but that the performer may still recover in *quantum meruit*, *restitution*, or other form of equitable relief. Always dangerous, we will nevertheless make an analogy to two concepts in criminal law. There are criminal acts *malum in se* (evil by their nature, such as murder) and there are criminal acts *malum prohibitum* (wrongful because a law says so, like jaywalking or improper parking in a commercial loading zone). Florida cases provide an excellent example. Tracking the subsequent case history to the *Castro* case, one learns that it was *superseded by statute* as recognized *in Earth Trades, Inc. v. T & G Corp.*, 637 So. 2d 989 (Fla. 3d DCA 1994). At first blush, lack of a contractor's license has been used as a defense to prevent enforcement of a contract, but not necessarily to the ability to recover on an equitable basis. However, the Florida Legislature returned to the issue to make clear that the lack of such license is seriously against public policy, to the extent that the lack of such license does in fact disqualify the violator from any recovery (*Earth Trades, Inc.*). The same public policy is evident in the *Spiro* case excerpted above.

Problem 25-1

After recently having his car repossessed and feeling desperate to have another car, Otto made the decision that he wanted to steal a car and put a dealer tag on the car to make it seem more "legit." Otto did not want to get his hands dirty, though, so he contacted Annabelle, who was well-known for being the most efficient car thief in the area. They entered into a written contract where Annabelle would steal a car for him in exchange for $5,000. If

Annabelle decides to end her life of crime, what is her best defense for not performing under the contract?

C. Legal Purpose with Possible Illegal Uses

DE LAGE LANDEN FINANCIAL SERVICES, INC. v. CRICKET'S TERMITE CONTROL INC.

District Court of Appeal of Florida, Fifth District, 2006

942 So. 2d 1001

ORFINGER, J.

* * *

The issue we consider is whether the lease agreement is an enforceable contract, or if it is void for violating the Florida Statutes or Florida public policy. Generally, "[a] contract which violates a provision of the constitution or a statute is void and illegal and, will not be enforced in our courts." *Harris v. Gonzalez,* 789 So.2d 405, 409 (Fla. 4th DCA 2001). Cricket's argues, and the trial court agreed, that the parties' lease agreement was void and unenforceable because its use of the System violated section 501.059's prohibition of automated telephone solicitation. [Footnote omitted] We disagree.

A contract is not void merely because a party used the contracted-for item illegally. "If an agreement is capable of being performed in a legal manner, the mere fact that one of the parties to the agreement intended to perform it in an illegal manner will not preclude its enforcement." 17A Am.Jur.2d *Contracts* § 225 (2006); *see also* 17A Am.Jur.2d *Contracts* § 228 (2006) (stating that "where a contract could have been performed in a legal manner as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner, at least if the performance is not seriously injurious to the public order[;] ... [n]or will a contract be declared void because it might have been performed in an illegal manner, since bad motives are never to be imputed to any person where fair and honest intentions are sufficient to account for his or her conduct").

While no Florida courts have addressed these specific facts, the Arkansas Supreme Court dealt with the same issue on nearly identical facts in *Potomac Leasing Co. v. Vitality Centers, Inc.,* 290 Ark. 265, 718 S.W.2d 928 (1986). In that case, Vitality Centers entered into an agreement with Potomac, to lease an automated telephone system that was manufactured by a company who was not a party to the action. After making a few payments on the lease, Vitality returned the system to Potomac and ceased payment. Potomac sued

Vitality to enforce the lease. Vitality, who had planned to use the system to randomly dial phone numbers and play a recorded message advertising its products, claimed that the contract was void because its intended use was illegal in Arkansas, and, therefore, the subject matter of the lease was also illegal. The trial court agreed with Vitality, but the supreme court overruled that decision. *Id.* at 928-29.

The Arkansas Supreme Court held that the fact "[t]hat the subject matter of a contract is to be used for an illegal purpose, does not in itself make a contract for the sale of that product void." *Potomac,* 718 S.W.2d at 929. In support of its holding, the court cited to 6A Arthur L. Corbin, *Corbin on Contracts,* § 1519 (1962), which elaborates:

> If the terms of a contract and its actual performance are all in themselves lawful, it is not made unlawful by the fact that the subject matter is capable of being put to illegal uses. Fire arms, a house, a motor car, liquors, a fountain pen can all be used for tortious or criminal purposes; but a contract for their sale is not for that reason invalid. Such a bargain is not enforceable by the buyer, however, if he buys with the purpose of making an illegal use of the subject matter. A seller who, with knowledge of the buyer's illegal purpose, makes the sale and delivers the subject matter, thereby increases the probability that the illegal purpose will be carried out, even though he does not participate in the purpose, urges its abandonment, and hopes for the best. This fact makes the bargain unenforceable by the seller also, if the illegal purpose of which he has knowledge involves the commission of a serious crime or an act of great moral turpitude. In cases other than these, the seller's knowledge of the purpose does not prevent his enforcement of the bargain, if he in no way participates in the purpose and does not act in furtherance of it aside from making the sale.

Potomac, 718 S.W.2d at 929-30.

* * *

REVERSED AND REMANDED.

Note

Examples of *illegal* contracts, i.e., that violate public policy, include contracts in restraint of trade (such as particularly onerous non-compete clauses in employment contracts), contracts that call for the charging of an usurious amount of interest, contracts that encourage others to commit a tort or crime, contracts involving gambling, and at least in the past, contracts that would have the effect of discouraging marriage.

2. Fraud/Misrepresentation

Fraud/misrepresentation is very often the subject of a tort claim, and there may be overlap when a contract is involved. The tort of fraud/misrepresentation is a *claim* that may entitle the harmed party to damages, including the remedy of non-enforcement of a contract. The contractual form of fraud/misrepresentation is a *defense* used to prevent enforcement. For "national" purposes, it may be important to set out the elements of a tort of deceit/fraud: (1) a statement was made; (2) it was material; (3) the statement was false; (4) the maker knew of its falsity (or was aware of its likely falsity); (5) the statement was intended to induce reliance; (6) someone actually relied on it; (7) the reliance was reasonable; and (8) the party who acted on it suffered a pecuniary loss as a result.

Another distinction is worthy of mention. *Fraud in fact* is where a party causes (note: we were careful not to use the word "induces") another to enter into a contract for something other than what is represented. An example would be if your business partner had you sign away your partnership rights by having you think that you were signing a renewal of your janitorial/office cleaning contract. These are *void*. *Fraud in the inducement* is where someone misrepresents the facts for his/her advantage. An example would be where a seller assures the buyer that the lot being sold is in a developing subdivision, and not in a swamp, when it is actually in a non-developable swamp. These are *voidable* – let the innocent buyer opt to rescind or go ahead with the bargain.

CMM Approach: whenever you see fraud/misrepresentation/deceit, carefully identify whether it is being asserted as a claim in tort, or as a defense in contract. It may be asserted in the same factual situation, and lawyers should be careful to rely on the right one. The distinction between fraud in fact and fraud in inducement is also not too complicated, though terminology can sometimes be a bit confusing. Moreover, there are numerous defenses, many with similar (but different) elements. A little care in memorization and understanding of the factual distinctions between them is recommended.

A. Fraud in the Factum

OCC NORTH AMERICA, INC. v. CAPUTO

United States District Court, S.D. Florida, 2006

416 F. Supp. 2d 1321

DIMITROULEAS, District Judge.

THIS CAUSE is before the Court upon Plaintiff's Motion for Preliminary Injunction, filed herein on December 7, 2005 [DE–7], Defendants' Memorandum in Opposition to Plaintiff's Motion, filed herein on January 3, 2006 [DE–32], and Plaintiff's Reply to Defendants' Opposition, filed herein on January 4, 2006 [DE–35]. After carefully considering the Motion, having heard the argument of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

1. BACKGROUND

Plaintiff Océ North America, Inc. (“Oce”) is a corporation organized under the laws of the Delaware with its headquarters in Chicago, Illinois. Oce's Digital Documents Systems division has offices in Boca Raton, Florida. Oce is a supplier of print and document management and delivery technology including software, printers, copiers, plotters and scanners. Defendant Dominick Caputo is a citizen of New York and is currently employed by Kodak–Versamark, a competitor of Oce North America.

Prior to his resignation on September 23, 2005, Defendant had been an employee of Oce and its predecessor company for approximately 20 years. Until 2004, Caputo held the position of Vice President for the Eastern Sales Area and was responsible for supervising approximately 75 salespeople and managers. In late 2004, Malkon Baboyian, President of Oce's Digital Document Systems Division, named Caputo as Vice President of Strategic Accounts as part of a division restructuring. As a result, Caputo was responsible for supervising only six salespeople and managers, but received a three percent increase in base salary. Following the changes to his position and job responsibilities, Caputo expressed dissatisfaction with his position.

Defendant's compensation at Oce consisted of a base salary of $195,000, bonuses paid if the established sales targets were met, as well as additional benefits such as a car allowance and participation in stock option plans. In late 2004, Caputo was presented with a compensation package compiled by Oce's Bill Mayer, Vice President of Oce's Human Resources Department. The package contained information regarding salary and bonuses, a car lease program, and an “Award Certificate” granting an option to participate in Oce's Stock Appreciation (Phantom) Plan (hereinafter “the Plan” or “the Agreement”). The Award Certificate contained language stating that “Awardee acknowledges that a copy of the Plan and a summary thereof have been provided to the Awardee ... the Awardee has read the Plan and this Award Certificate and understand the terms and conditions contained therein and ... will abide by the obligations of the confidentiality and noncompetition (sic) set forth in the Plan.” Caputo signed the Certificate and returned it to Mayer in

December, 2004. The Plan referenced in the Award Certificate consists of eight pages of “Plan Highlights” and an eleven-page appendix. The Appendix contains detailed provisions regarding noncompetition and nondisclosure obligations under the Plan, which, generally stated, prohibit employment for a two-year period by a business that competes with Oce, in the geographical regions where such business is conducted. The Appendix also states that Oce is entitled to seek injunctive relief in the event of a breach of the noncompetition and nondisclosure provisions.

On September 23, 2005, Caputo announced his voluntary retirement from Oce, and he began employment at Kodak–Versamark (“Kodak”) in October. On December 7, 2005, Oce filed the instant Motion for Preliminary Injunction seeking an injunction prohibiting Caputo from continuing his employment with Kodak. Oce claims that Caputo has breached the noncompetition and nondisclosure agreements by commencing employment Kodak, a competitor of Oce. Oce claims that Caputo signed the Award Certificate acknowledging receipt of the Plan and compliance with its noncompete and nondisclosure provisions. Oce asserts that the non-compete agreement is valid being reasonable in scope and serving to protect legitimate business interests Oce also claims that Caputo, as an employee in a high level executive position, had access to confidential trade secret information which would be harmful to Oce if disclosed to a competitor like Kodak.

Caputo contends that the Stock Appreciation Plan agreement is not enforceable. He asserts that although he signed the Award Certificate, admittedly without having read it, he never received a copy of the Plan itself and was mistaken and misled as to its contents. Caputo asserts that he was never been informed of the non-competition provisions of the Plan and received only the document labeled “Award Certificate” without an attached copy of the Plan itself. He further argues that upon later requesting a copy of the Plan, Mr. Mayer sent him a copy of the Plan Highlights only, which described forfeiture of stock options for violating the non-competition agreement but did not include the detailed non-competition provisions set forth in Appendix A. He asserts that his mistake as to the Plan's contents and consequences and Oce's failure to disclose its material terms invalidates the contract and, therefore, a preliminary injunction is not appropriate.

* * *

3. Fraud in the Factum

Defendant also contends that the Agreement is not enforceable due to fraud committed in its execution. Fraud in the execution of a contract, known as fraud in the factum, renders a contract void. *Langley v. FDIC,* 484 U.S. 86, 93, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987); *see also Simms v. Biondo,* 816 F.Supp. 814, 824 (E.D.N.Y.1993); *Dougherty v. Mieczkowski,* 661 F.Supp. 267, 274 (D.Del.1987) (“if misrepresentation of character or essential term of contract”,

"no effective manifestation of assent and no contract at all" (quoting RESTATEMENT (SECOND) CONTRACTS § 163, cmt. a)). Fraud in the factum is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents." *Langley,* 484 U.S. at 93–94, 108 S.Ct. 396. Defendant contends that he was misled as to the contents of the Plan and signed an instrument different from what he understood it to be. Defendant asserts that he was provided with the Award Certificate only, not a copy of the Plan, and later upon requesting the Plan was given only the Plan Highlights which describe only the stock forfeiture aspects of any non-competition provisions, misleading him further as to his obligations under the Agreement. The Certificate was presented in the context of a benefits package, with the only one reference to noncompetition obligations found in the text of the Award Certificate itself with no further explanation. These factors caused Caputo to sign the contract "without true knowledge of its true nature or contents."

Based on evidence presented at the hearing, the Court finds that Plaintiff has provided the necessary quantum of evidence to show that Malkon Baboyian was not involved in any fraud in connection with Caputo's signing the award certificate. Plaintiff has not, however, made such a showing with regard to Bill Mayer, Vice President of Human Resources. Accordingly, the Court concludes that Plaintiff has not succeeded in overcoming Defendant's fraud defense at this time.

* * *

B. Fraud in the Inducement/Misrepresentation

YOST v. RIEVE ENTERPRISES, INC.

District Court of Appeals of Florida, First District, 1984

461 So. 2d 178

ERVIN, Chief Judge.

These consolidated appeals and cross-appeal arise from a final judgment of the trial court in an action involving the purchase and sale of a restaurant. We affirm in part and reverse in part.

An action was instituted by Rieve Enterprises, Inc. (Rieve), against Yost for rescission and cancellation of an agreement and related documents executed between the parties to purchase the Red Barn Barbecue Restaurant (Red Barn), and for damages, based on false and fraudulent statements by Yost representing that the restaurant premises complied with all laws necessary to

conduct the business and that all equipment was in working order and would pass inspections required for the operation of the restaurant. Yost later brought an action against Rieve for damages stemming from its default on the promissory note and breach of the security agreement. Meanwhile, Stirrett Enterprises, Inc. (Stirrett), Yost's real estate agent, also filed a complaint against Yost for the unpaid balance owing on a broker's commission. The cases were consolidated by the trial court and a jury was assigned to determine the issues of fraud by Yost and breach of the contracts by Rieve, while the issues of rescission and cancellation, and Stirrett's entitlement to the broker's commission were to be decided only by the trial judge.

Interested in buying a restaurant, Richard Ramano, his wife Evelyn Glenn, and her brother Richard Jason, of Rieve Enterprises, contacted Stirrett who had the exclusive listing agreement with Yost for the sale of the Red Barn. [Footnote omitted] After visiting and conducting a visual inspection of the premises, Rieve entered into an agreement on January 11, 1982 to purchase the assets and equipment of the Red Barn, as well as a five-year lease of, and option to buy, the land and building. The Rieve group agreed to assume $10,000 in purveyors' bills, and executed a promissory note to Yost for the amount of $95,000, also granting to Yost a security interest in the restaurant's assets, as described in the security agreement, and agreed to pay $10,000 to Stirrett on February 1, 1982. Rieve paid an initial deposit of $10,000, and the additional amount of $10,005.82 on January 13, 1982, the date of the closing, against the total purchase price of $135,005.82.

Before the sale, the Rieve group did not make inquiries to Yost or Stirrett, or check the public records concerning previous health inspections, neither did Yost or Stirrett or Rieve's own visual inspection reveal any defects in the restaurant premises. Although the group's primary concern in acquiring the restaurant was directed to the volume of business rather than the physical characteristics of the premises, they nevertheless relied upon the following clause in the purchase and sale agreement provided by Stirrett: “Seller warrants that at the time physical possession is delivered to buyer, all equipment will be in working order and that the premises will pass all inspections necessary to conduct such business.” Rieve took possession immediately after the sale of January 13, continuing the business until January 27, when the Board of Health conducted a routine inspection, citing fifty-two health code violations, and thereupon closed the restaurant. [Footnote omitted] The violations related to problems with electrical wiring, plumbing and sanitation, improper drainage, poor ventilation, and an improperly installed oven which consequently had to be condemned.

After shutting down the business, Ramano requested Yost to return to him the $20,005.82 paid, but did not ask him to make any repairs, although the lease on the building and land contained a provision whereby Yost, as landlord, was responsible for maintenance of such areas of the building as the roof,

downspouts, and walls. On January 28, Yost, Ramano, Cristine Duris, the mortgagee of the restaurant premises, and Duris' attorney, met to discuss whether a plan could be devised to continue the operation of the business by the Rieve group in order to avoid foreclosure. Yost agreed to give a drainage and sewage easement across his property, and to make whatever repairs were necessary to open the restaurant. Ramano was unwilling to continue the business and, instead, abandoned the Red Barn and failed to make the $10,000 payment due on February the first, or any other payments connected with the transaction.

The jury returned a verdict, finding that fraud and deceit were practiced upon Rieve by Yost, awarding compensatory damages in favor of Rieve and against Yost in the sum of $10,000, while also finding that Rieve breached the contracts relating to the purchase of the Red Barn, although no damages were awarded to Yost. The trial court entered a final judgment in accordance with the verdict, and, by bench judgment, declared the promissory note, security agreement and lease to be null and void, and ruled that Stirrett was not entitled to recover the balance of the brokerage commission from Yost.

Yost argues that rescission of the contracts was improper since no evidence was presented to demonstrate that he made any *false* or *fraudulent representations* to the Rieve group, and, although the contract warranted that the building would pass all inspections and the equipment would be in working order at the time possession was delivered to the buyer, he could not foresee that at some time thereafter the building and equipment would not fulfill those requirements. Rieve's counter-argument is that Yost's failure to reveal the *material defects* of which he had *knowledge* amounted to fraud, and that the contractual representation as to the condition of the premises and equipment was false.

The essential elements of a fraudulent representation upon which relief can be granted are (1) a false statement of fact by the defendant, (2) knowledge by the defendant that the statement was false at the time it was made, [Footnote omitted] (3) intent that the statement induce another to act in reliance thereon, and (4) actual reliance on the statement resulting in damage to the plaintiff. *See Held v. Trafford Realty Company,* 414 So.2d 631 (Fla. 5th DCA 1982). Misrepresentation of material facts, even though *innocently* made, acted upon by the other party to his detriment, will constitute a sufficient ground for rescission and cancellation in equity. The proper inquiry is not whether the party making the representation *knew* it to be false, but whether the *other party believed it to be true and was misled by it in entering into the contract,* so that whether the misrepresentation was *innocently* or *knowingly made,* the legal effect is the same. *Langley v. Irons Land & Development Co.,* 94 Fla. 1010, 114 So. 769 (1927). *Held* at 632–33; *Lynch v. Fanning,* 440 So.2d 79, 80 (Fla. 1st DCA 1983). Additionally, the party guilty of the fraudulent misrepresentation may not be shielded by the doctrine of *caveat*

emptor. Thus, the purchaser of business property is entitled to rely on the truth of the seller's representations even though the falsity could have been ascertained had the buyer made an investigation—unless the latter *knew* the representations to be false, or the falsity was *obvious* to him—if the seller, as owner of the property, had *superior knowledge* of its size, condition and income. *Besett v. Basnett,* 389 So.2d 995, 998 (Fla.1980).

Based on the foregoing authorities, we find that the evidence below amply supports the trial court's rescission of the contracts on grounds of misrepresentations by Yost, in that the premises of the Barn did not pass the inspections necessary for conducting the business and some of the equipment was not in good working order, as warranted in the contract for purchase, and because the Rieve group relied on such contractual assurances—the falsity of which they neither knew nor was obvious to them—as inducement to purchase the restaurant causing them financial injury, regardless of whether the misrepresentations were *knowingly* or *innocently* made. There was abundant evidence from which the trial court could deduce that Rieve relied to its detriment upon the false representations of Yost, regardless of whether Yost made the representations innocently or with knowledge. Yost, the seller, either knew, or had reason to have known through previous violations that the premises could not comply with all laws necessary to conduct the restaurant. Less than two months before the execution of the purchase agreement, Yost was aware that the premises had been cited for a seeping sewage filter bed. Although a later reinspection reported that the defect had been corrected, Yost should have been aware, through the knowledge of his agent Albert, that the attempt made to remedy the problem was only a temporary, “band-aid” measure. Albert had simply filled in the seeping area with sand, despite having received an estimate that the cost to repair it properly would be about $8,000 to $10,000. (Albert later testified that he had held the Red Barn together with “spit, nails and chewing gum.”) After Rieve had abandoned the premises, the mortgagee's actual cost to repair the septic tank and adjoining area was $5,835 out of a total of $40,000 expended. Testimony was further adduced that it would have cost Rieve $18,000 in repairs to bring the premises in compliance with existing regulations.

* * *

The judgment of the trial court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

(1). Misrepresentation of Material Fact

Restatement (Second) of Contracts § 162(2) (West 1981)

(2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.

MOUSTAFA v. OMEGA INS. CO.

District Court of Appeals of Florida, Fourth District, 2016

201 So.3d 710

* * *

We have stated that "[a] misrepresentation is material if it does not enable a reasonable insurer to adequately estimate the nature of the risk in determining whether to assume the risk." *Singer v. Nationwide Mut. Fire Ins. Co.,* 512 So.2d 1125, 1128–29 (Fla. 4th DCA 1987).

* * *

The determination of materiality under section 627.409(1)(a) is generally a question of law based on "an objective view of what is material." *Singer,* 512 So.2d at 1129 (discussing an earlier version of section 627.409, but concluding that materiality in this context should be based on an objective standard); *see also de Guerrero v. John Hancock Mut. Life Ins. Co.,* 522 So.2d 1032, 1033 (Fla. 3d DCA 1988) ("Where the evidence is clear and uncontradicted the materiality of the misrepresentation shall be decided as a question of law.").

In contrast, the determination to be made under section 627.409(1)(b) regarding how an insurer would have acted had it known the true facts is "one of fact requiring testimony by the insurer's representatives" that implicates "the subjective view of what a particular insurer would or would not have deemed material if it had known the true facts." *Singer,* 512 So.2d at 1129 (discussing the earlier version of section 627.409 but concluding that this determination is subjective in nature and thus requires witness testimony).

* * *

Moustafa admitted during his EUO that: 1) he inaccurately stated on the applications that there were not any losses at the home in the prior three years, and that the home did not have any previous water damage; 2) there were water stains throughout the home that he had not repaired, but simply painted over sometime between 2008 and 2011; and 3) he understood that by signing the application, including the statement of condition and applicant's

statement, he approved what was stated therein. These admissions, as well as the unrebutted testimony of an assistant vice president in the underwriting department, were sufficient to prove that Moustafa's misrepresentations were material and affected Omega's decision to issue or renew the policy. *See Kieser,* 712 So.2d at 1262–64 (holding that misrepresentations were material based in part on the affidavit of an insurance company's senior vice president of underwriting).

* * *

(2). Intentional, Reckless, Negligent, or Innocent

Restatement (Second) of Contracts § 162(1) (West 1981)

(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker

(a) knows or believes that the assertion is not in accord with the facts, or

(b) does not have the confidence that he states or implies in the truth of the assertion, or

(c) knows that he does not have the basis that he states or implies for the assertion.

Problem 25-2

Olympia recently inherited a two-carat diamond ring from her grandmother and is looking to sell it but is planning on switching the diamond out for a cubic zirconia to get more money for the ring. Olympia reaches out to Andy, who is preparing to propose to his girlfriend, and offers to sell her “authentic” two-carat diamond ring to Andy. A written contract is entered into between Olympia and Andy where Andy will purchase the ring for $15,000. If Andy discovers that the ring is a fake prior to tendering the purchase price of the ring, what is Andy’s best defense for not performing under the contract?

Problem 25-3

Well-known handbag designer, Designer, creates and sells some of the most sought-after purses to celebrities. To increase her handbag production, due to the enormous demand of purses, Designer hires Apprentice to help create the bags. Celebrity contacts Designer to create a purse for her for $2,000. Designer accepts the offer and the two enter into a contract where Designer would create a one-of-a-kind purse for Celebrity made from the finest kangaroo leather. Designer allows Apprentice to create the purse and after Apprentice had finished the bag, Apprentice does not let Designer know that

she used cow leather instead of kangaroo leather because she was afraid of being fired. If Celebrity discovers that the purse is not made from kangaroo leather prior to tendering the purchase price of the purse, what is Celebrity's best defense for not performing under the contract?

(3). Intent to Induce

Restatement (Second) of Contracts § 167 (West 1981)

A misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent.

ROCKY CREEK RETIREMENT PROPERTIES, INC. v. ESTATE OF FOX

District Court of Appeals of Florida, Second District, 2009

19 So. 3d 1105

* * *

To avoid a contract based on negligent misrepresentation, the party seeking to avoid the contract must establish the following elements:

> (1) misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the representation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend that the representation induce another to act on it; (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

Atl. Nat'l Bank of Fla. v. Vest, 480 So.2d 1328, 1331-32 (Fla. 2d DCA 1985); *see also Baggett v. Electricians Local 915 Credit Union,* 620 So.2d 784, 786 (Fla. 2d DCA 1993).

The Estate presented some evidence to show that Rocky Creek's representative, Lupo, made a misrepresentation of material fact concerning whether the Agreement allowed a resident to "sue" Rocky Creek in a "court of law." The Estate also presented some evidence that Lupo made these statements without knowledge as to their truth or falsity. However, the Estate presented no evidence that Lupo intended for the residents, including Ms. Fox, to rely on that representation when signing the Agreement. Instead, the only evidence presented shows that Lupo encouraged residents to read the Agreement and discuss it with their families and attorneys before deciding

whether to sign it. In addition, Lupo told the residents that they did not have to sign the Agreement to remain a resident. Under these circumstances, the overall evidence presented was insufficient, as a matter of law, to establish that Lupo intended for Ms. Fox to rely on his representations when deciding whether to sign the Agreement. In the absence of evidence of this intent, the Estate cannot avoid the terms of the Agreement that was signed by Ms. Fox.

* * *

(4). Justifiable Reliance

Restatement (Second) of Contracts § 168(2)(a)(b) (West 1981)

> (2) If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly be interpreted as an assertion (a) that the facts known to that person are not incompatible with his opinion, or (b) that he knows facts sufficient to justify him in forming it.[59]

ROSE v. ADT SEC. SERVICES, INC.

District Court of Appeals of Florida, First District, 2008

989 So. 2d 1244

* * *

In examining the concept of justifiable reliance, the Florida Supreme Court has explained:

> The question ... is whether the recipient of the misrepresentation is "justified in relying upon its truth." For if the recipient "knows that it [the statement] is false or its falsity is obvious to him," his reliance is improper, and there can be no cause of action for fraudulent misrepresentation.

M/1 Schottenstein Homes, Inc. v. Azam, 813 So.2d 91, 94–95 (Fla.2002) (quoting *Besett v. Basnett,* 389 So.2d 995, 997 (Fla.1980)) (citations omitted). Notwithstanding oral misrepresentations prior to the making of a contract, a party cannot establish justifiable reliance and "may not recover in fraud for an alleged false statement when proper disclosure of

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the truth is subsequently revealed in a written agreement between the parties." *Taylor Woodrow Homes Fla., Inc. v. 4/46–A Corp.,* 850 So.2d 536, 542–43 (Fla. 5th DCA 2003); *see also Aedes Mosquito Control, Inc. v. Springer Equip., Inc.,* 959 So.2d 1208, 1209 (Fla. 1st DCA 2007)(citing with approval *Giallo v. New Piper Aircraft, Inc.,* 855 So.2d 1273, 1275 (Fla. 4th DCA 2003) (holding that a party could not recover from aircraft dealer for allegedly fraudulent statements that the new avionics system would "enhance the safety of the aircraft" where the subsequent written agreement disclaimed any oral representations or warranties as to the dealer)).

Here, subsequent to the alleged misrepresentations by the ADT representative, Mr. Rose and ADT entered into the subject agreement which contained the following provision in bold-faced capitalized type immediately above Mr. Rose's signature:

> CUSTOMER STATES THAT, BEFORE SIGNING THIS AGREEMENT, HE/SHE HAS READ BOTH SIDES OF THIS AGREEMENT AND UNDERSTANDS ALL TERMS AND CONDITIONS OF BOTH THIS AND THE REVERSE SIDE OF THIS AGREEMENT, IN PARTICULAR, PARAGRAPH 1, LIMITED WARRANTY, AND PARAGRAPH 7, LIMIT OF LIABILITY.

Directly above this paragraph, the agreement contained the following provision in capitalized type:

> CUSTOMER ACKNOWLEDGES THAT HE/SHE IS AWARE THAT NO ALARM SYSTEM CAN GUARANTEE PREVENTION OF LOSS, THAT HUMAN ERROR ON THE PART OF ADT OR THE MUNICIPAL AUTHORITIES IS ALWAYS POSSIBLE, AND THAT SIGNALS MAY NOT BE RECEIVED IF THE TRANSMISSION MODE IS CUT, INTERFERED WITH, OR OTHERWISE DAMAGED. THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE CUSTOMER AND ADT. CUSTOMER AGREES THAT ANY REPRESENTATION, PROMISE, CONDITION, INDUCEMENT OR WARRANTY, EXPRESS OR IMPLIED, NOT INCLUDED IN WRITING IN THIS AGREEMENT SHALL NOT BE BINDING UPON ANY PARTY, ...

This provision expressly contradicts the oral representations allegedly made by ADT's salesperson. We agree with the trial court that the Roses cannot claim that they justifiably relied on oral representations when the terms of the subsequent written agreement expressly and conspicuously contradict the oral statements. Therefore, the trial court did not err in entering summary judgment in favor of ADT on appellants' fraud in the inducement claim.

* * *

Problem 25-4

Father recently purchased a car from Dealer for $15,000. Prior to purchasing the car, Dealer had assured Father that the brakes on the car were brand new and worked perfectly. Son asked Father if he would be able to drive the car to the grocery store and Father permitted Son to take the car to the store. On the road, Son slammed on the brakes of the car to avoid an accident, but the brakes completely failed. Upon inspection, it is discovered that the brakes were completely faulty and were completely worn down. If Father attempts to rescind the contract, what is Father's best defense in favor of rescission?

3. Duress

AMS STAFF LEASING, INC. v. TAYLOR

District Court of Appeal of Florida, Fourth District, 2015

158 So. 3d 682

TAYLOR, J.

AMS Staff Leasing, Inc., appeals a non-final order denying its motion to abate the action and compel arbitration. Because we find that the agreement to arbitrate was valid, we reverse.

On December 18, 2012, the plaintiff, Robert Taylor, started working as a truck driver for Diamond K Resources, LLC. The plaintiff was hired by a supervisor at Diamond K after providing his driver's license and social security card. The plaintiff testified that he did not fill out any paperwork that day.

When the plaintiff arrived at a Florida job site on the morning of December 21, 2012, a supervisor gave him a written application for employment with AMS, an employee leasing company based in Dallas, Texas. The supervisor told the plaintiff and the other drivers to fill out the form, backdate it to December 19, 2012, and return it within five minutes or else they could "go home" and would be fired. The plaintiff filled out the paperwork on the hood of a truck under a parking lot light. The plaintiff signed the agreement, but he did not read it because he did not have his reading glasses with him.

The agreement contains an arbitration clause that requires any dispute with AMS to be arbitrated in Texas:

1 agree that my sole recourse for resolving any dispute with AMS arising under my employment, including but not limited to wage claims, shall be to arbitrate such dispute. Such arbitration shall be pursuant to the arbitration laws of the State of Texas and the rules, then obtaining, of the American

Arbitration Association. Venue of any action shall be in Dallas County, Texas. AMS is based in Dallas, Texas, and Applicant acknowledges that this Agreement is to be partially performed in Dallas, Texas.

In January 2013, the plaintiff was injured in the course and scope of his employment. The plaintiff's employment was terminated shortly thereafter.

The plaintiff then sued AMS and Diamond K for wrongful termination, claiming that the reason he was terminated was because he made a valid claim for workers' compensation.

AMS made a special limited appearance in the action and filed a Motion to Abate and Compel Arbitration. The court held a hearing on the motion and allowed the plaintiff to give testimony concerning the circumstances surrounding the execution of the arbitration agreement.

Counsel for the plaintiff argued that: (1) AMS waived enforcement of the agreement by not seeking arbitration in the workers' compensation case; (2) the arbitration agreement violated public policy because it failed to exempt workers' compensation matters and because it required a Florida hourly-wage worker to travel to Texas to arbitrate a claim that his termination violated the workers' compensation law, and (3) the arbitration agreement was unconscionable and was procured under duress.

* * *

One possible defense to arbitration is duress. “[D]uress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition.” *Francavilla v. Francavilla,* 969 So.2d 522, 524–25 (Fla. 4th DCA 2007) (citations and internal quotation marks omitted). To establish duress, two factors must be proven: (1) that the act was effected involuntarily and was not an exercise of free choice or will, and (2) that this condition of mind was caused by some improper and coercive conduct by the other side. *Id.* at 525. “Duress involves a dual concept of external pressure and internal surrender or loss of volition in response to outside compulsion.” *Id.* (citation and internal quotation marks omitted). Moreover, as a general rule, a contract “may not be set aside on the basis of duress or coercion unless the improper influence emanated from one of the contracting parties—the actions of a third party will not suffice.” *Vitakis–Valchine v. Valchine,* 793 So.2d 1094, 1096 (Fla. 4th DCA 2001).

Even without considering AMS's argument that any alleged coercion came from a third party, [Footnote omitted] we find that there was insufficient evidence to establish duress. The only evidence of a “threat” in this case was the threat that the plaintiff's services were not needed if he did not sign the employment contract. This is insufficient to constitute

duress. *See* Restatement (Second) of Contracts § 176 cmt. a (1981) ("An ordinary offer to make a contract commonly involves an implied threat by one party, the offeror, not to make the contract unless his terms are accepted by the other party, the offeree. Such threats are an accepted part of the bargaining process."). Moreover, the plaintiff never testified that the allegedly coercive conduct induced his assent to the employment agreement; nor did he testify that but for the allegedly coercive conduct, he would have demanded removal of the arbitration provision or otherwise would have avoided signing the agreement.

* * *

Reversed and Remanded.

Note

The original common law duress involved threat of death, serious physical harm, or imprisonment to the contracting party or a close family member – something *physical*. Over time, jurisdictions began to give their imprimatur to *economic duress*, i.e. a form of *mental* pressure. As was noted in Section A above on Illegality, wrongdoers are hopefully getting smarter and would, for example, realize that physical threats are quite easy to prove. As wrongdoers become more creative, however, the law should and does evolve in order to redress new kinds of wrongs.

4. Undue Influence

PEACOCK v. DU BOIS

Supreme Court of Florida, 1925

90 Fla. 162

TERRELL, J.

Some time in 1921 Anna Du Bois Robie, aged 57, moved from Albany, N. Y., to Ft. Lauderdale, Fla., where she purchased certain real estate on which she resided as her home. She left surviving her in the state of New York one son, Kenneth H. Du Bois, and one daughter, Grace Du Bois Whitcomb, and Le Roy Whitcomb, husband of said Grace Du Bois Whitcomb, all of whom are appellees here.

Anna Du Bois Robie died intestate in a hospital at Miami September 13, 1922. On May 31, 1922, George L. Peacock, aged 28, appellant in this case, took board and lodging with Mrs. Robie and remained in her home up to the time of her death. It appears that Peacock was very attentive to Mrs. Robie these

three months or more he roomed and boarded with her, and about four weeks prior to her death she executed a deed to him covering her home place; the same being lots 5 and 6 of block 6 of Rio Vista subdivision as the same appears of record in the public records of Broward county, Fla. She also made him a bill of sale to her automobile.

This suit was brought by appellees in the court below to cancel and set aside the deed from Mrs. Robie to Peacock on the ground of fraud and undue influence. Issue was made on the answer and cross-bill to the amended bill of complaint. Testimony was taken by a special master, and on final hearing the chancellor entered his decree in favor of appellees. Appeal is taken from this decree.

Counsel for appellant devote considerable space in their brief discussing the sufficiency of the allegation of the amended bill of complaint to support fraud and undue influence on the part of appellant. The sufficiency of the amended bill was not tested by demurrer or other appropriate pleading in the court below, so the question cannot be considered at this time. Thomas Bros. Co. v. Price, 56 Fla. 854, 48 So. 262; Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 So. 410;Hancock v. State Exchange Bank, 70 Fla. 243, 70 So. 211; Hartford Fire Ins. Co. v. Brown, 60 Fla. 83, 53 So. 838.

It is conceded by all counsel engaged in this case that the sole question presented for review here is the sufficiency of the testimony to sustain the decree of the chancellor. This court has repeatedly held that in equity as in law every presumption is in favor of the correctness of the ruling of the trial court and a decree based largely or solely on questions of fact will not be disturbed unless clearly erroneous. Viser v. Willard, 60 Fla. 395, 53 So. 501; Powell v. Powell, 77 Fla. 181, 81 So. 105; Whidden v. Rogers, 78 Fla. 93, 82 So. 611; Sandlin v. Hunter Co., 70 Fla. 514, 70 So. 553.
Does the testimony show fraud and undue influence? Fraud and undue influence are not, strictly speaking, synonymous, though undue influence has been classified as either a species of fraud or a kind of duress, and in either instance is treated as fraud in general. Heath v. Capital Savings Bank & Trust Co., 79 Vt. 301, 64 A. 1127; Cooper v. Harlow, 163 Mich. 210, 128 N. W. 259; Grove v. Spiker, 72 Md. 300, 20 A. 144; Frush v. Green, 86 Md. 494, 39 A. 863, 866.

In Howard v. Farr, 115 Minn. 86, 131 N. W. 1071, the court said:

‘To constitute ‘undue influence,’ the mind * * * must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but * * * subject to the will or purposes of another.'

In Myatt v. Myatt, 149 N. C. 137, 62 S. E. 887, the court said that, to constitute 'undue influence,' it is unnecessary that moral turpitude or improper motive should exist, and if one, from the best of motives, having obtained a dominant influence over a grantor's mind, induces him to execute a deed or other instrument materially affecting his rights, which he would not have otherwise executed, so exercising the influence obtained that the grantor's will is effaced or supplanted, the instrument is fraudulent.

In Prescott v. Johnson, 91 Minn. 273, 97 N. W. 891, the court held that:

'Undue influence which will invalidate a gift must be something which destroys the free agency of the donors and substitutes therefor the will of another. What constitutes such undue influence cannot be precisely defined, and each case must be determined upon a consideration of its special facts. The means employed and the extent of the influence are immaterial if their effect be to destroy the free agency of the donor. The ultimate fact of undue influence may, and in many cases can only, be established by circumstantial evidence.'

The rule seems to be well settled that undue influence justifying the setting aside of will, deed, or other contract must be such as to dethrone the free agency of the person making it and rendering his act the product of the will of another instead of his own. The character of the transaction, the mental condition of the person whose act is in question, and the relationship of the parties concerned to each other, are all elements that may be taken into consideration in applying the rule. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760; Allday v. Cage (Tex. Civ. App.) 148 S. W. 838; Councill v. Mayhew, 172 Ala. 295, 55 So. 314; Mullen v. Johnson, 157 Ala. 262, 47 So. 584; Berst v. Moxom, 157 Mo. App. 342, 138 S. W. 74; Burnett v. Smith, 93 Miss. 566, 47 So. 117; Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087; Franalin v. Belt, 130 Ga. 37, 60 S. E. 146;Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; Wilcoxon v. Wilcoxon, 165 Ill. 454, 46 N. E. 369; Marx v. McGlynn, 88 N. Y. 357, 370; Du Bose v. Kell, 90 S. C. 196, 71 S. E. 371; Woodville v. Woodville, 63 W. Va. 286, 60 S. E. 140, 144.

In Appeal of Worrall, 110 Pa. 349, 1 A. 380, 385, 765, it was held that, where a conveyance was made by a weak and sickly young man to a woman older than himself, and who had been to him as a mother, a presumption arose that such conveyance was obtained by undue influence.

In the case at bar a woman in her late 50's, physically infirm, knowing that she was soon to undergo an operation which might and in fact did prove fatal, conveyed her home and other property valued at approximately $15,000 to a young man in his late 20's. The record discloses that the money represented by this property had been recently inherited from an uncle, that the woman was a novice in business, could be readily influenced, and easily became the

dupe and tool of any one with whom she came in contact. She had no sense of moral values, was greatly lacking in knowledge and business experience, and, while it is not conclusively shown that she was a woman of enfeebled mentality in the common acceptation of that term, it is shown that she was possessed of a mind unbalanced, that she knew no distinctions among men or women, and as easily became the victim of the good or the honest as she did the bad or the dishonest.

The property involved in this litigation is virtually all that Mrs. Robie owned, and it is repulsive to every rule of law and right and love and justice to argue that she would uninfluenced deed this property for a nominal consideration to a young man who was a stranger to her, that she had known hardly two months, and who it is not shown had nay claims whatever on her bounty, thereby disinheriting the children she had mothered, and to whom she was bound by all the ties of love and affection. The fact of the execution of the deed on the showing made by the record we think imposes on the appellant the duty of showing that the transaction was bona fide, and that it was not secured by undue influence. The testimony is entirely inadequate to show this. Worrall's Appeal, 110 Pa. 349, 1 A. 380, and note 386, 765.

* * *

For reasons announced in this opinion, the decree of the chancellor was properly entered, and is affirmed.

Notes

75. There is an interesting balance for the defense of undue influence. To qualify, it requires both elements, but in the right balance. This could be either a very weak mind preyed upon by someone with some authority over the weak mind, or a somewhat weak mind preyed upon by an actor with significant power to exert authority over the weak mind. In other words, the weaker the mind, the less influence would need to be proven to successfully invoke the defense.

76. It may be helpful to note that, as was set out in the *AMS Staff Leasing, Inc.* case, duress coming from a third party is not actionable. Contrast this to subsection 3 of the Restatement (Second) Contracts that follows.

Restatement (Second) § 177. When Undue Influence Makes a Contract Voidable

(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the

relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.

(2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

(3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

Problem 25-5

Anthony currently lives in a nursing home and rarely gets visitors. One day, Olaf visits the nursing home and, after talking to other nursing home residents, discovers that Anthony has a large home that will be given to his estranged children upon his death. Olaf introduces himself to Anthony and convinces Anthony to sell his home to Olaf for $20,000, even though the home is roughly worth $500,000. If Anthony has second thoughts and attempts to rescind the contract, what is Anthony's best defense in favor of rescission? With more facts, is there another possible defense set out in Chapter 24?

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 25

1. The similarities and differences between the defenses in this and the last chapter – especially which ones are different, and what kinds of facts trigger the use of one defense over another
2. The difference between fraud in fact and fraud in the inducement
3. The difference between the original, common law duress and its current, usual form (economic)

SUGGESTED EXERCISE(S)

1. Review cases in Florida and in other jurisdictions, as well as outside sources, to identify a more concise set of factors for the tort of fraud/misrepresentation listed in the introduction to Section B above. Try to develop a workable standard with less than eight elements.

2. Compare the elements of some cause of action or defense to the Restatement (Second) Contracts. The Restatements may break things down in an elemental fashion in a way that could help to sharpen an outline.

CHAPTER 26: POST-FORMATION DEFENSES

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The potential confusion between some of the defenses to contract enforcement and to the elements of formation (which would be part of the pre- and during-formation phase) is fortunately not implicated in the case of post-formation developments. Sometimes, things that happen after formation of an agreement are such game-changers that they provide one or both (or all) parties with an excuse to walk away from the agreement, perhaps with the payment of some restitution damages. Cases of this nature often rely implicitly on the foreseeability of a post-formation event as well as the *potential assumption of the risk* that a major, sometimes catastrophic, event or occurrence will nullify the purpose(s) of a contract. For example, a farmer in Maine might be released from liability for failing to turn over her wheat crop to a local grain cooperative after a tornado and without having to pay damages – whereas a farmer in Ohio might not be released from liability due to the foreseeability of tornadoes in that state and the industry standard of securing crop damage insurance.

It may be difficult to discern whether the general types of defenses considered in this Chapter are the same or whether they rely on the same basic requirements to assert such defense. At least one Florida court has treated them as substantially similar, which is set forth immediately below. Note however the distinction made in the *Crown Ice Mach. Leasing Co.* case between impossibility of performance and frustration of purpose. Not to be forgotten is the fact that common law provisions supplement Code provisions where the Code is silent. Thus, one may assert the U.C.C. defense of "excuse of a presupposed condition" for commercial impracticability at the same time as act of God or the other defenses are also being asserted. Note 1 of the excerpted *Capitol Associates, Inc.* case seems to make this point.

1. Acts of God, Impossibility, & Frustration of Purpose Generally

The following case merges all three concepts, probably because the specific question posed was whether there was no contract for lack of consideration based on an illusory promise. Rather than considering it to be an illusory promise, the *Mailloux* court found that obligations which could be excused for one of the recognized defenses were not *illusory*.

MAILLOUX v. BRIELLA TOWNHOMES, LLC

District Court of Appeal of Florida, Fourth District, 2009

3 So. 3d 394

STEVENSON, J.

The Maillouxes, purchasers of a proposed condominium unit, appeal a final summary judgment entered in favor of the developer, Briella Townhomes, LLC, wherein the trial court found the sale exempt from disclosure requirements set forth in the Interstate Land Sales Full Disclosure Act ("ILSA"), 15 U.S.C. §§ 1701–20 (2006), since construction was required to be completed within two years. The trial court also found that Briella's failure to provide an ad valorem tax disclosure summary pursuant to Florida Statutes section 689.261 (2006), did not provide the Maillouxes with a private cause of action. We affirm, concluding that . . . the contract's act of God, impossibility of performance and frustration of purpose clauses did not render the obligation to complete the condominium within two years illusory. . . .

The material facts are not contested. The Maillouxes executed a contract for the purchase of a condominium in Boynton Beach from Briella, but later, they sought to revoke and terminate this contract, citing Briella's failure to comply with ILSA's registration and reporting requirements. A developer need not furnish a printed property report to a purchaser of land under a contract obligating the seller to erect a building thereon within a period of two years. 15 U.S.C. § 1702(a)(2). However, the Maillouxes contend that Briella failed to unconditionally obligate itself to complete construction within two years because the contract for sale permitted delays associated with acts of God, impossibility of performance, and frustration of purpose.

The Department of Housing and Urban Development ("HUD") has issued Guidelines to assist with interpreting ILSA. Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 61 Fed. Reg. 13596 (Mar. 27, 1996). Pertinent to the instant issue, the Guidelines provide:

> Contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected. For example, provisions to allow time extensions for events or occurrences such as acts of God, casualty losses or material shortages are generally permissible.... Although the factual circumstances upon which nonperformance or a delay in performance is based may vary from transaction to transaction, as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control.

Guidelines, 61 Fed. Reg. at 13603.

In Florida, acts of God, impossibility of performance, and frustration of purpose are well-recognized defenses to nonperformance of a contract. *See, e.g., Fla. Power Corp. v. City of Tallahassee,* 154 Fla. 638, 18 So.2d 671, 675 (1944) (recognizing that an act of God which is extraordinary and unprecedented such that human foresight could not guard against it provides legal justification for nonperformance of a contract); *Am. Aviation, Inc. v. Aero–Flight Serv., Inc.,* 712 So.2d 809, 810 (Fla. 4th DCA 1998) (explaining that impossibility of performance can provide a defense to nonperformance of a contract where facts making performance impossible were not available to promisor prior to execution of contract); *Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A.,* 493 So.2d 548, 548 (Fla. 3d DCA 1986) (noting that doctrine of frustration of purpose can render a contract unenforceable). Nonetheless, the Maillouxes rely on *Samara Development Corp. v. Marlow,* 556 So.2d 1097 (Fla.1990), for the proposition that a "contract must unconditionally obligate the developer to complete construction within two years." *Id.* at 1098.

In *Samara,* our supreme court held that a contractual limitation on a purchaser's remedies of specific performance or damages rendered a purchase contract obligating the developer to complete construction within two years "illusory." *Id.* at 1101. The instant case is distinguishable as it concerns recognized defenses to nonperformance as opposed to the limitation of remedies. Therefore, in accordance with the Guidelines and Florida contract law, we hold that the well-recognized defenses to contractual nonperformance which are included in the contract at issue do not render Briella's obligation to complete construction within two years illusory within the ILSA context.

* * *

Affirmed.

Note

The court in *Mailloux* distinguishes non-performance defenses ("Act of God," impossibility, and frustration of purpose) from the argument that a performance is "illusory." The latter is a formation issue. Again, we are faced with consideration of the difference between a formation problem and a defense, as was also the case when comparing *mutual mistake*, a defense, from lack of current intent to accept or a failure of sufficient specificity of essential terms. We have opined on potential reasons for distinguishing between the two in the Introduction to Chapter 24. Perhaps the difference lies with the mechanics related to possible remedies. If there is no formation, there are no damages (possibly restitution of things already transferred). With an executory contract, it is difficult to argue that there was no formation and therefore in such cases it is more logical to utilize defenses to enforcement.

A. Acts of God

The case is somewhat archaic, but it addresses the issues of what is an "Act of God," and what are close relations. There is also a hint of disclaimer of risk by contract, which would assign risk on one of the parties.

CLYDE S.S. CO. v. BURROWS

Supreme Court of Florida, 1895

36 Fla. 121

MABRY C. J. (after stating the facts).

There is very little disagreement about the facts of this case. That the steamship company is a common carrier, and received the fish in good condition, properly packed in ice, for transmission to New York, is not questioned on the record. It is conceded, further, that the shipment of the fish was without any bill of lading, and there was no special contract, in writing, fixing or limiting the liability of the company in reference thereto.

It is insisted by counsel for appellant that the referee erred in holding, on the facts of the case, that the company was not released from liability for the loss of the fish resulting from decay, and this contention is based upon two theories: The first is that the fish perished, without fault on the part of defendant, from inherent natural causes, for which the company was not liable; and the second is that plaintiffs knew when the fish were shipped that they were to go as released goods, and that the company did not take such

goods under any other conditions than that they should be released. Passing for the present the contention stated, we will first refer to the issues upon which the case was tried.

The declaration alleges that the defendant company did not take care of and safely deliver the fish, though no dangers of navigation prevented, but took so little and such bad care of them that by its negligence in not keeping them properly iced, and other negligence, they became wholly lost to the plaintiffs. The plea, the substance of which we have set out in the statement, is voluminous for law pleading, but it sets up the defense that the fish perished from inherent defects, in consequence of an unavoidable delay, caused, without fault on the part of defendant, by the vessel's encountering a heavy northeast gale, with a high and dangerous sea, that loosened her rudder post at the bottom, rendering her navigation impossible, and that the accident to the vessel was caused by a peril of the sea. It is also alleged that the ship was without ice sufficient to preserve the fish until the end of the voyage, and that none could be procured in the port where she was detained in consequence of the delay. By the rule of the common law, common carriers are held to a very high and strict liability for the loss of goods received for carriage. In Packard v. Taylor, 35 Ark. 402, the rule is stated as follows, viz.: 'The carrier's obligation to keep and carry safely is founded on the custom of the realm, at common law, and is independent of contract; being imposed by law for the protection of the owner, and founded upon public policy and commercial necessity. Chit. Carr. 34, 35. There may be a special contract, also, not, indeed, superseding that implied by law, which still underlies the other, but restricting or modifying it in some particulars, in a manner which the courts may not consider unreasonable, or subversive of the general policy. But in the absence of any such contract the carrier is an insurer,-liable not only for negligence, but even for inevitable accident, not occasioned by act of God.' In that case there was no question of public enemies. At common law the carrier's liability transcends all questions of care and diligence, and he is virtually an insurer against all risks of loss or injury, save those resulting directly from the act of God or the public enemy, and without the intervention of human agency. This is the rule as established by authority. Friend v. Woods, 6 Grat. 189; Maslin v. Railroad Co., 14 W. Va. 180; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469; Gleeson v. Railroad Co., 140 U. S. 435, 11 Sup. Ct. 859; Norris v. Railway Co., 23 Fla. 182, 1 South. 475; Railroad Co. v. Little, 71 Ala. 611; Hutch. Carr. § 174 et seq.; Coggs v. Bernard, 1 Smith, Lead. Cas. (9th Ed.) 354, and notes; Id., 2 Ld. Raym. 909. When the carrier is in the line of his duty, and the loss or injury to goods in his custody for carriage is solely attributed to the act of God or the public enemy, it is matter of defense, to be pleaded and established by proof.

The authorities are not entirely harmonious as to what causes of a natural and unexpected character are to be embraced within the exemption of the liability stated, and, on the issues in the present case, we do not deem it necessary to

go into a general discussion of this subject. The plea alleges that the ship in question was disabled by a heavy northeast gale, with a high and dangerous sea, which was a peril of the sea. Issue was joined on the plea, and the referee found, distinctly, that the accident to the vessel was not caused by a peril of the sea. If the testimony shows clearly, without contradiction, that the detention of the vessel was caused by a peril of the sea, and defendant was without fault in any respect, the finding should have been in its favor, without reference to whether or not the peril of the sea causing the accident was an act of God. The plea does not allege, in terms, that the accident to the vessel was caused by an act of God, but it is alleged to be a peril of the sea. The terms are not, in our judgment, synonymous. Plaisted v. Navigation Co., 27 Me. 132; Central Line of Boats v. Lowe, 50 Ga. 509. In referring to the expression 'act of God,' Wheeler on Modern Carriers (page 296) says, 'There are other terms, such as 'perils of the seas, lakes, rivers, and navigation,' and 'inevitable accident,' frequently found in bills of lading, and used to express various causes of loss and injury, from responsibility for which the carrier is exempted, either by the operation of law, or the express terms of the contract. In such cases the rule is the same.' This author further states that the terms referred to are frequently used as synonymous with the 'act of God,' but not always so. In cases of special contracts permitted by law, they, of course, would control; but in the absence of such contracts the terms are not, in our judgment, synonymous. An act of God may include a peril of the sea, but there may be perils of the sea that are not embraced in the terms 'act of God,' and against which the carrier can only escape liability by such special contract as the law permits. For comment on the case of Colt v. McMechen, 6 Johns. 160, see Hutch. Carr. § 178. So we need not decide, on this appeal, whether the cause of the accident to the vessel in question was the 'act of God,' as the issue tendered by the plea and accepted by plaintiffs was whether the accident resulted from a peril of the sea. Nor are we at liberty to disregard the plea on the ground that it is insufficient to present a proper defense for the defendant, as it was not objected to by demurrer, and the trial was had on the issue tendered by it. Mudge v. Treat, 57 Ala. 1; Jones v. Collins, 80 Ala. 108. We think the testimony in the record, without any contradiction, shows that the defendant was without fault. After the accident happened, it is shown that no ice could be had to save the fish, and that they spoiled in consequence of the melting of the ice in which they were packed. It was also shown that the vessel was in good condition, properly equipped for the usual hazards of the voyage, and skillfully navigated, and that her rudder post was knocked out of its position by a very severe and unusual northeast gale, with high and dangerous seas. That the cause of the accident was a peril of the sea, we have no doubt; and, as there is no conflict in the evidence on this point, the finding of the referee cannot be sustained. This conclusion disposes of the appeal, and, if the case is to stand upon the issues made, nothing further need be said in reference to the other contention; but it may not be amiss to say that we do not consider that there is any sufficient plea setting up the defense that the fish were shipped as released goods. The burden is upon the carrier to set up

and maintain such a defense. Michigan Cent. R. Co. v. Mineral Springs Manuf'g Co., 16 Wall. 318.

The second plea sets up only that the fish were carried at owners' risk of damage arising from natural causes, and that they perished from such causes. This is not alleging a special contract of release from common-law liability, or duty arising under the contract of affreightment. At common law the carrier was not liable, under the exceptions above mentioned, when the loss arose from the nature and inherent character of the property carried, such as the natural decay of perishable articles, when handled with care, and transported in proper time. Maslin v. Railroad Co., supra. On the evidence before us, independent of any other ground of defense, or exemption of liability, we would not be disposed to disturb the finding on the ground that the loss of the fish was not caused by inherent natural causes. That fish are liable to natural decay, by reason of inherent causes, is evident; but the undisputed evidence before us is that, when properly iced, they will keep at least two weeks, and, further, that the usual time for the defendant's steamers to go from Jacksonville to New York was from four to five days. The vessel could not, of course, without legal excuse, delay the voyage until the fish spoiled, and set up their perishable nature as a defense.

The judgment of the court below is reversed.

B. Impossibility

FERGUSON v. FERGUSON

District Court of Appeal of Florida, Third District, 2011

54 So. 3d 553

SHEPHERD, J.
This is an appeal from an order voiding a provision of a mediated marital settlement agreement as a result of changes in the economy. Based upon the bedrock principle of contract law—applicable as well to marital settlement agreements—that bad deals are as enforceable in the law as good deals, we reverse the order under review.

The mediated marital settlement agreement in this case was signed and the final judgment of dissolution entered on August 8, 2008. The paragraph of the agreement which gives rise to this action reads as follows:

> 18. ***REAL PROPERTY:***

(A) The parties are owners as tenants by the entirety real property located at: ... and referred to as the marital residence. The approximately [sic] market value is $950,000.00 and there is currently one mortgage on the home of approximately $603,000.00.

(B) In consideration the Husband shall pay to the Wife the sum of $185,000.00 within sixty (60) days from the execution of this agreement.

(C) Said refinancing shall take place within 120 days from the execution of this agreement. The Husband shall be solely responsible for all of the expenses associated with the refinancing.

(C) [sic] Simultaneously with the execution of the agreement the Wife shall execute and deliver unto the Husband, a Quit–Claim Deed transferring all of her right, title and interest in and to the above described property together with all fixtures located therein to him and said property shall thereupon become his sole property and he shall be entitled to a quiet and peaceful enjoyment of said property including any and all utility deposits in connection therewith. Said Quit–Claim Deed shall be held in escrow by the Husband's counsel to be given to the closing agent at the time of the refinancing.

(D) The Husband shall indemnify and hold harmless the Wife from any and all property taxes, assessments, insurance payments, repair expenses, maintenance expenses, utility bills and all other expenses concerning said real property after the Wife vacates the marital home.

(E) If the Husband fails to refinance the home to release to the Wife within 120 days, then the home shall be immediately placed for sale with a licensed realtor to be agreed upon solely by Husband. The net proceeds of the sale shall be the sole property of the Husband.

(F) The parties agree that the Wife shall be able to reside in the marital residence with the minor child once the Temporary Certificate of Occupancy has been issued by the city of Palmetto Bay. While the Wife is occupying the marital home, she shall be responsible for the utilities during the period of time of her occupancy. The marital home is to be returned to the Husband upon the conclusion of the occupancy period absent normal wear and tear. The Husband shall give to the Wife reasonable notice

> when he will be going to the marital home and access to the home cannot be unreasonably denied.
>
> (G) The Wife shall vacate the marital home thirty days after she receives the $185,000.00 as her equalization payment for the marital home and the $5,500.00 in child support arrears minus one half of the net proceeds from the sale of the mobile home.

Although not a candidate for a future style manual, the agreement is unambiguous. Subsection (C) obligated the former wife to execute and deposit a quitclaim deed in escrow with the former husband's counsel upon execution of the marital settlement agreement, which she did. Subsection (B) required the former husband to pay the former wife an “equalization payment” of $185,000 (subject to minor adjustments) within sixty days of the date the agreement was executed. Subsection (C) requires the former husband to refinance the home within 120 days of the agreement's execution. The plain language of the agreement establishes that its object was (1) to bring about an unconditional payment of $185,000 to the former wife; (2) achieve an ownership transfer of the property to the former husband; and (3) relieve the former wife of any further financial responsibility for the property contemporaneously with the transfer. Notably, the couple, in paragraph (E) of the agreement, anticipated the possibility of one future circumstance, the failure of the former husband to refinance the property within 120 days of the execution of the agreement. In that circumstance, the parties agreed the property immediately would be placed for sale, with the net proceeds going to the former husband. It cannot be gainsaid that the couple's mutual understanding of the value of the property influenced the negotiation.

Shortly after August 8, 2008, and apparently unanticipated by the former husband, the Florida real estate market entered into one of its periodic downward adjustments, for which it has become famous since the time of the Great Depression. The former husband neither paid his former wife the approximate $185,000 equalization payment nor tried to refinance the house. Instead, he unilaterally sought to list the house for sale with a realtor, but the former wife, who has lived in the home with the parties' minor child, has not cooperated.

Rather, the former wife filed a motion for contempt and enforcement of paragraph eighteen, specifically for the payment of $185,000 and the refinancing of the house. The former husband filed a motion requesting the trial court to order the former wife to cooperate with the sale of the home pursuant to the parties' agreement. In his motion, the former husband stated, “Due to the real estate market conditions, the former husband has not been able to refinance the former marital home solely under his name and thus has not been able to pay the monies owed to the former wife pursuant to the parties' agreement.”

After hearing arguments on the motions, the trial court declared paragraph eighteen "to be an impossibility of performance due to changes in the economy and therefore void." The court further ordered the former wife to vacate the home, that the home be appraised, and finally that it immediately be listed for sale with the net proceeds divided between the parties. The former wife appeals.

The former husband advances the preliminary complaint that the former wife has not brought forward an adequate appellate record for our review. *See Applegate v. Barnett Bank of Tallahassee,* 377 So.2d 1150, 1152 (Fla.1979). He complains specifically that the record lacks a transcript or approved statement of the proceedings from which emanated the orders under review. *See* Fla. R.App. P. 9.200(b). The record in this case is sparse. The absence of a transcript of a hearing can be fatal to an appellant, especially if the hearing was an evidentiary hearing. However, it is not a rule absolute in an appellate proceeding that the appellant must present a transcript of the proceeding below. For example, an appellate court may, as we now do, reverse a trial court order if there exists reversible error on the face of the order or judgment. *See Casella v. Casella,* 569 So.2d 848, 849 (Fla. 4th DCA 1990) (finding reversible error on the face of the amended judgment alone). In this case, we find the trial court reversibly erred by voiding paragraph eighteen of the mediated marital settlement agreement for impossibility of performance due to changes in the economy.

A marital settlement agreement entered into by the parties and ratified by a final judgment is a contract, subject to the laws of contract. *See Andersen Windows, Inc. v. Hochberg,* 997 So.2d 1212, 1213 (Fla. 3d DCA 2008); *Delissio v. Delissio,* 821 So.2d 350, 353 (Fla. 1st DCA 2002). Because of the central importance placed upon the enforceability of contracts in our culture, the defense of impossibility (and its cousins, impracticability and frustration of purpose) must therefore be applied with great caution if the contingency was foreseeable at the inception of the agreement. *Home Design Ctr.-Joint Venture v. Cnty. Appliances of Naples, Inc.,* 563 So.2d 767, 769–70 (Fla. 2d DCA 1990). As further developed by Professor Williston in his treatise,

> The important question [in an impossibility inquiry] is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor.

6 Williston, Contracts (Rev. ed.) § 1931 (1938).

In this case, the decline in the real estate market shortly after the Former Husband signed the marital settlement agreement, while marked and

unfortunate, was not the sort of unanticipated circumstance that falls within the purview of the doctrine of impossibility. Economic downturns and other market shifts do not truly constitute unanticipated circumstances in a market-based economy. The assignment of this risk before a final closing of the transaction between the parties was therefore among those for which a reasonably prudent person, represented by counsel, might have provided. A trial court is not authorized to intervene to ameliorate a hardship that a promisor, such as the former husband in this case, could have thus avoided. *McCutcheon v. Tracy,* 928 So.2d 364, 364 (Fla. 3d DCA 2006) ("[A] court may not deviate from the terms of a voluntary contract either to achieve what it might think is a more appropriate result or 'to relieve the parties from the apparent hardship of an improvident bargain.' ") (quoting *Beach Resort Hotel Corp. v. Wieder,* 79 So.2d 659, 663 (Fla.1955)).

In addition, the former husband cannot sidestep the consequence of his failure to include such a provision with the argument that the lack of such a provision renders this otherwise unambiguous agreement ambiguous. *See Life Ins. Co. of N. Am. v. Cichowlas,* 659 So.2d 1333, 1338 (Fla. 4th DCA 1995) ("[W]here a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the matter, the court should not, under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted."). The former husband is bound to the agreement he struck.

Accordingly, the trial court was obligated to enforce the mediated marital settlement agreement as voluntarily agreed upon by the parties. *See McCutcheon,* 928 So.2d at 364.The former wife is entitled to a judgment against the former husband for the $185,000 equalization payment after any adjustments required by the marital settlement agreement. [Footnote omitted] If the marital residence has a temporary certificate of occupancy, the former wife and child shall be entitled to occupy the house consistent with the terms of the marital settlement agreement until such time as the equalization amount is paid or the house is sold. The marital residence should be listed for sale with a real estate agent chosen by the former husband, who shall be contractually entitled to receive the net proceeds of the sale, as provided in the marital settlement agreement.

Reversed and remanded for further proceedings consistent with this opinion.

HOLLY HILL FRUIT PRODUCTS CO., INC. v. BOB STATON, INC.

District Court of Appeal of Florida, Second District, 1973

275 So. 2d 583

MANN, Chief Judge.

The Commissioner's finding that Staton's delivery of oranges ‘from various groves located in Highlands and Hardee Counties' was frustrated by a freeze which made performance legally impossible is supported by substantial competent evidence. Impossibility of performance of agricultural contracts varies according to whether the seller contracts to sell his own produce, in which case an individual crop failure constitutes legal impossibility, or whether an obligation is assumed to furnish fruit regardless of source. In the latter case there is still such a concept as legal impossibility, and the Commissioner did not misperceive the question involved. Contrary to Holly Hill's contention, Staton's obligation was not to buy fruit wherever he could find it in order to fulfill the contract. His obligation was to find fruit, if possible, even at greater expense than anticipated, in Highlands and Hardee Counties. That is what he bargained to do, but the Commissioner determined the performance was impossible. See Annotation, 84 A.L.R.2d 103; Corbin, Contracts, cc. 74, 75; 17 Am.Jur.2d, Contracts s 402.

The Commissioner did err in failing to give effect to the agreement of the parties with respect to interest payable on advances to Staton. A separate agreement, involving a mortgage, fixed a rate of interest at nine per cent, permitted by law. The agreement was incorporated by reference into the contract out of which this dispute arose, and the Commissioner had jurisdiction of the matter under Fla.Stat. s 601.66 (1971), F.S.A. The entire controversy should have been adjudicated. The denial of interest as agreed on the advances repayable by Staton was error.

Certiorari granted. The order is approved except with respect to the amount of damages, but is quashed and the cause is remanded for entry of an order in accordance with this opinion.

HOBSON, J., and PIERCE, J. (Ret.), concur.

Notes

77. It is worth pointing out from the *Ferguson* excerpt that economic downturns are not excuses that justify an impossibility defense. These can be anticipated, and therefore provided for by insurance, price adjustment, etc. (You may recognize that this is an implicit assignment of risk that prices fluctuate).

78. Thinking strategically, which falls under the category of playing a smart game, it is advised to take stock of the most common forms of impossibility so as to recognize quickly what area of law is being tested (contracts defenses). While this is not an exhaustive list, the main forms of impossibility appear to be 1) the subject matter of a contract has been destroyed; 2) a necessary party to the contract has died or has become legally incapable of contracting; and 3) the performance being sought is prohibited by law (which is not necessarily saying that something is *illegal*). (The first situation appears to be very similar to *act of God*.)

C. Frustration of Purpose

CROWN ICE MACH. LEASING CO. v. SAM SENTER FARMS, INC.

District Court of Appeal of Florida, Second District, 1965

174 So. 2d 614, *cert. denied*, 180 So. 2d 656 (Fla. 1965)

DRIVER, B. J., Associate Judge.
Appellant, Crown Ice Machine Leasing Company, a corporation, appeals from a Final Decree entered by the Circuit Court of Palm Beach County, Florida, rescinding and cancelling a written contract between it and Sam Senter Farms, Inc., a corporation. Appellant was defendant and appellee was plaintiff below. Appellant will hereafter be referred to as 'Crown Ice' and appellee as 'Farms.'

The Record on Appeal reflects a complex pleading structure and an involved factual background. However, only so much of the pleadings and facts as are necessary to this Opinion will be recited.

Farms owns in Belle Glade, Florida, a packing house, where it prepares large volumes of fresh vegetables for shipment in carload lots. Crown Ice is a corporation engaged in the furnishing of ice and ice-making equipment to commercial users of ice. The two corporations, through their respective officers, Sam Senter, individually for Farms, and a Mr. Stella, for Crown Ice, during the summer and early fall of 1959, entered into negotiations, which led to a contract between the two corporations, whereby Crown Ice installed in Farms' packing house an ice-making machine designed to produce 'snow ice,' which was a type of ice required in Farms' operations. In exchange for the use of the ice-making equipment, Farms was to pay rental of $30,000 per year.

Shortly after the ice-making equipment was installed, disputes arose because of the failure of the ice machine to operate properly or to fulfill the purposes for which Farms had contracted. Consequently, upon the alleged failure of the machinery to operate, Farms refused to make the rental payments, and

litigation ensued. However, this litigation was settled when the parties entered into a ‘substitute contract’ dated June 29, 1961.

This latter contract of 1961 cancelled out the previous contract between the parties and released the parties from their obligations thereunder, with the proviso, however, that, if Farms should default in the 1961 contract, then the parties would revert to their status under the previous contract, which had been dated October 24, 1959.

Under the new or substitute contract, it was agreed that Crown Ice would take over the actual operation of the ice-making equipment already installed by Crown Ice at Farms' packing house, and Crown Ice would maintain and operate the machinery. Farms agreed to make facilities available for the ice-making equipment and to give Crown Ice the right to repair existing equipment and to install additional equipment as might be necessary. Farms further agreed to purchase the total ice-making capacity of the equipment from October 1st through June 30th of each year of the term of the agreement, paying $8 per ton for the ice purchased.

Under this agreement, Crown Ice took over the operation of the ice plant and installed additional equipment, including the equipment necessary to deliver the snow ice from the ice-making machine itself to where it was needed in the freight cars and trucks loaded at Farms' packing house. The record shows that even after efforts were made to correct the deficiencies in the operation of the ice-making and loading equipment, Farms complained that the equipment was not fulfilling the purpose for which it (Farms) had contracted. Crown Ice thereupon installed additional equipment in an effort to satisfy Farms' complaints. It is disputed as to whether or not the latter efforts of Crown Ice were effective. However, the Chancellor apparently found that they were not. This finding of the Chancellor is binding upon this Court.

On March 26, 1962, Farms notified Crown Ice that it would purchase no more ice from Crown Ice, and directed that the equipment of Crown Ice be removed from Farms' packing house. Crown Ice disputed Farms' action in rescinding the contract, charging that Farms had not purchased all of the ice produced by Crown Ice's icing equipment, and asserting Crown Ice's ability to fulfill the contract. However, the ice-making equipment was, in due time, removed by Crown Ice and leased to Swift & Company in Gainesville, Georgia. Farms, after notifying Crown Ice of its action, then filed suit to rescind and cancel the contract, alleging, in substance, that Farms had been induced to enter into the contract through misrepresentations that Crown could and would furnish all the ice required by Farms as needed, and alleging further that it was impossible for Crown Ice to perform in the manner to which it had agreed. Crown Ice answered the complaint and counterclaimed for damages against Sam Senter Farms, Inc., the appellee corporation, and against Sam Senter individually, as guarantor. The trial court, after taking volumes of testimony,

on final hearing rescinded and cancelled the contract, as prayed for by Farms, and denied to Crown Ice any relief on its counterclaim. It is this Order that is appealed from.

Appellant assigned numerous errors as grounds for reversal. However, these are all encompassed in the two questions posed and argued in appellant's brief.

As to the first of these, Crown Ice contends that the complaint should have been dismissed for failure to state a cause of action in that (a) it failed to allege any misrepresentation of a material fact; and (b) the complaint was fatally defective in not alleging an offer to restore Crown Ice to its original position. We shall first take up this attack on the ruling of the Chancellor in sustaining the complaint. The Chancellor in his decree found some equity in the complaint and, therefore, properly denied the motion to dismiss. We agree with the Chancellor.
The fundamental requirements necessary to state a cause of action for rescission or cancellation of a contract are:

(1) The character or relationship of the parties;

(2) The making of the contract;

(3) The existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground for rescission or cancellation;

(4) That the party seeking rescission has rescinded the contract and notified the other party to the contract of such rescission.

(5) If the moving party has received benefits from the contract, he should further allege an offer to restore these benefits to the party furnishing them, if restoration is possible.

(6) Lastly, that the moving party has no adequate remedy at law.

These minimum fundamental requirements were met by Farms in its original complaint, even though there was no allegation to restore Crown Ice to its original position. This was not necessary for the reason that, under the other allegations of the complaint, it was averred that Farms owed no further duty to Crown Ice, and that it (Farms) had received no benefits for which it still owed Crown Ice.

Concededly, the original complaint could have been more explicit in its allegations, but, reading the complaint as a whole, it alleges sufficient facts, which, if proved, would entitle Farms to rescission or cancellation of the contract under the theories of ‘impossibility of performance’ or ‘frustration of

purpose.' These two theories of 'impossibility of performance' or 'frustration of purpose,' while theoretically distinct, are often confused by the courts and textbook writers in applying them. (Corbin on Contracts, Vol. 6, § 1353.) The complaint would have entitled Farms to seek relief under either one of these theories. 'Impossibility of performance' refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform. 'Frustration of purpose' refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party. (Corbin on Contracts, supra; 13 Corpus Juris—Contracts, Sections 708, 709 and 710; 17A C.J.S. Contracts §§ 461, 462.)

Farms in its complaint averred that it had entered into the contract for the purpose of having a readily available supply of ice; that Crown Ice was aware of Farms' needs, and induced Farms to enter into the contract upon the representation that Crown Ice, through its equipment installed at Farms' packing house, could and would supply this need. The complaint further averred that with the equipment for which the parties contracted Crown Ice could not possibly fulfill its bargain, and that, consequently, Farms alleged implicitly although not explicitly that its purpose in making the contract had been frustrated, and it was entitled to be discharged from its obligations.
Crown Ice, as defendant-counter-claimant below, contended that it should be made whole for its expenses and costs incurred in installing the equipment in Farms' packing house, as well as loss of profit from the contract, and that the complaint was infirm for not alleging an offer to restore or make whole Crown Ice, citing as authority *Willis v. Fowler*, 102 Fla. 35, 136 So. 358; *Pryor v. Oak Ridge Development Corporation*, 97 Fla. 1085, 119 So. 326; *and Columbus Hotel Corporation v. Hotel Management Company*, 116 Fla. 464, 156 So. 893.

We agree with the Chancellor that the principles laid down in the above cited cases are not applicable herein. In each of the cases cited the party seeking rescission was, at the very time it sought rescission, in receipt of tangible benefits from its adversary, for which the adverse party had not been compensated. This is not so in the case at bar, since the only thing Farms had agreed to do was to purchase the ice from Crown Ice, and not the equipment to make that ice. And further, that Crown Ice had been compensated for all ice delivered to Farms. To require Farms to allege anything further in its complaint would require the Court to go further than construing the contract and, in effect, would constitute writing into the contract a duty on Farms to purchase the ice-making equipment, or pay for ice, which it had never received. The former could not be, for the reason that Crown Ice still has its equipment, for which it is collecting rents from Swift & Company, and certainly the latter ought not be required, since it would constitute payment of a penalty, and unjustly enrich Crown Ice by requiring Farms to pay Crown Ice

for ice which it had never received. (Poinsettia Dairy Products v. Wessel, 123 Fla. 120, 166 So. 306, 104 A.L.R. 216.)

We now proceed to the second point raised by appellant; that is, that, if Crown Ice had made any misrepresentations to Farms to induce Farms to enter into the contract, these misrepresentations were in the nature of a promise to do something in the future, and, as such, insufficient to support an action for rescission and cancellation of contract.

Farms, in its complaint, alleged that Crown Ice was fully aware of the requirements of the vegetable-processing business and of the need for having ice immediately available when required, and that Farms was induced to contract with Crown Ice only after being assured that Crown Ice, with the equipment installed and maintained on Farms' premises, would furnish all of the ice needed by Farms when needed. Implicit in the Chancellor's finding is that this inducement was made by Crown Ice and that the equipment installed by Crown Ice was not capable of fulfilling the needs of Farms. There is ample evidence in the record to sustain this finding by the Chancellor.

Under these circumstances, having found impossibility of performance on the part of Crown Ice, with the consequent frustration of Farms' purposes in making the contract, the learned Chancellor had no alternative but to find for Farms and against Crown Ice. (13 Corpus Juris—Contracts, Secs. 708, 709, 710, pp. 638, 639; 17A.C.J.S. Contracts §§ 461, 462.)

Appellant argues that Crown Ice, in good faith, endeavored to fulfill its contract. We find this argument to be without merit for the reason that in questions of rescission or cancellation of contract, upon the theory of impossibility of performance, the courts have applied the pragmatic test that good intentions or laudable motive are immaterial, and the results of performance are controlling. 7 (Fla. Jurisprudence—Contracts, Secs. 149, 175; Bacon v. Green, 36 Fla. 325, 18 So. 870.)

Our affirmance of the correctness of the lower court's ruling, granting the rescission and cancellation of the contract, makes unnecessary discussion of appellant's contention that, Farms having defaulted under the 1961 substituted contract, the parties revert to their positions under the October 1959 contract.

For the foregoing reasons, the decree appealed from is affirmed.

Notes

1. It is interesting that the court in *Crown Ice Mach. Leasing Co.* did not address the sale-of-goods defense of excuse by failure of a presupposed condition (reproduced below, and often described as the *commercially impracticable* defense). Official Comment 3 to § 2-615, in annotated versions of the Code, addresses the difference between the Code's *commercial impracticability* and its common law counterparts, i.e., *impossibility* and *frustration of purpose*. This is somewhat esoteric, but the reason may be because the Code favors use of the perfect tender rule (permitting outright rejection and damages), revocation and warranty possibilities. The timeline in that case may dictate the best defense to assert. It was probably too late to reject, or even to revoke acceptance of the ice machine. This leaves warranty damages, possibly an equitable remedy, and the possibility of interposing a contractual defense when the other party tries to enforce the contract. Then again, the occurrences that transpired in the case arose before the state of Florida's adoption of U.C.C. Article 2 in 1965 and its effective date of January 1, 1967.

2. The quintessential referent for purposes of *frustration of purpose* is *Krell v. Henry*, 2 K.B. 740 (1903). In that case, a person rented rooms with a good view of an upcoming coronation (King Edward 7) in order to watch the coronation live. When the coronation was postponed, the purpose for renting the room was gone – although the possibility of renting the room remained. This demonstrates the difference between *frustration of purpose* and *impossibility*, the latter of which could be demonstrated by, perhaps, a fire that destroyed the building before the coronation.

3. The common elements of the *frustration of purpose* doctrine seem to include 1) an important (material) purpose of the contract is frustrated; 2) the level of frustration is substantial rather than minimal; and 3) the non-occurrence of the frustrating event goes to a basic assumption of the contract. That the risk was not borne by the party asserting the defense would be an implicit condition as well.

Problem 26-1

Diggerz, Inc. contracted to excavate the foundation for Homeowner, who wished to build a new house in a particularly nice location and at a position to take the best advantage of a fantastic view. Diggerz, Inc. had operated in the area for several decades, and bid the job at $15,000 in a simple, one-page contract which Homeowner accepted. After completing approximately half of the removal, Diggerz, Inc. ran into bedrock, which would take weeks to blast out/excavate and which would more than quadruple the cost of performance. May Homeowner force Diggerz, Inc. to excavate nevertheless for the $15,000

contract price? Why, or why not? What if Diggerz, Inc. ran instead into a layer of clay that would take about one day more to excavate?

Problem 26-2

The summer before going to college or to some other post-high-school pursuit, Teenager 1 offered Teenager 2 $10,000 to buy Teenager 2's really cool convertible in the following Autumn after Teenager 2 had used it for the entire summer. In mid-September, Teenager 1 entered a monastery where he was required to take a vow never to use motor vehicles. Teenager 2 filed suit in October to enforce the contract. What result? Does it matter that Teenager 2 knew of Teenager 1's potential plans for a monastic life?

2. Interplay of Defenses & Remedies

It is important to give at least some cursory thought to the question of remedies in the case of an equitable defense to enforcement. That a contract may be rescinded does not necessarily mean that it is not possible for a party to collect damages. The following case addresses issues of specific performance (an equitable remedy) and damages (a legal remedy) in the context of impossibility of performance for failing in an agreement to secure the participation of necessary parties. Obviously, what the parties knew and who bore the risk based on their knowledge would be part of any solution, which would have been addressed in the case on remand. Interesting is the fact that the impossibility was for failure to include in contractual arrangements a necessary party, which may have been occasioned by pending divorce proceedings on one side of the negotiations.

CAMP v. PARKS

District Court of Appeal of Florida, Fourth District, 1975

314 So. 2d 611

WALDEN, Judge.

The trial court granted plaintiff-seller's motion for summary judgment and ordered the defendant, as purchaser, to specifically perform the terms of their Agreement to Sell Corporate Stock and Pledge of Stock as Security. Defendant appeals. We reverse and remand with instructions to allow plaintiff to amend his complaint, if he wishes, in order to pursue money damages for breach of contract. *See* 29A Fla.Jur., *Specific Performance* § 157 (1967).

Plaintiff-Parks was president of a close corporation. He owned 50% of the stock. His wife, Jane Parks, was vice president and secretary, and owned the

other 50% of the stock. Defendant, Camp, worked for this corporation as an employee. Over a period of time defendant and plaintiff discussed a sale of plaintiff's stock to appellant. Finally, a contract was drawn up which specified that: plaintiff, as seller, was to sell to defendant, as purchaser, 25 shares, a one-half interest in the corporation. The method of payment for this, $50,000, was specified as $1,000 down payment in cash, $150 per week, and, in addition, 5% of the gross revenues of the company every month. Upon receipt of the down payment by plaintiff, he was to assign the stock to defendant. Also plaintiff was to resign as a Director and President of the company and defendant was to be appointed as Director and President. Defendant further agreed to continue working full time with the company until the stock purchase was paid off. Other terms included a transfer to defendant of specified personal property owned by the company, and a transfer of one-half of all the cash and accounts receivable standing on the company's books on the date plaintiff resigned as president.

The basic problem with the implementation of this contract stems from the fact that plaintiff's wife, the other half owner of the company, did not sign the agreement. Although only defendant and plaintiff consented to the contract, some of the terms of the contract necessarily involve the participation of the company. The company could only be brought into the agreement through the participation of Jane Parks. Repeating, *neither Jane Parks nor the company was a party to the suit or the agreement and so, of course, is in nowise obligated by the agreement or the judgment*.

Although space was provided on the contract for the written consent of Jane Parks, she did not execute the contract. Apparently, she does not agree to its terms and would not sign it as written. It appears from the record that Jane Parks had knowledge of the agreement prior to its execution, but did not voice any objection nor consent to its terms. Contemporaneously with the filing of the lawsuit, Mr. and Mrs. Parks instituted dissolution of marriage proceedings.

Defendant has paid all monies owing under the terms of the contract into an escrow account. The stock has not yet been assigned to defendant because Jane Parks took the certificates belonging to her former husband, and has refused to return them.

When the trial court, on plaintiff's motion, entered summary final judgment in favor of plaintiff it ordered specific performance totally and without limitation.

The trial court's order of summary judgment found the stock to be freely transferable, and that plaintiff, Parks, at no time represented to defendant that Jane Parks had consented to the agreement. Further, the court held that, since defendant, Camp, had the opportunity to discuss the contract with Jane Parks prior to the execution of the agreement, he could not raise impossibility

of performance as an affirmative defense, citing *Shore Investment Company v. Hotel Trinidad*, 158 Fla. 682, 29 So.2d 696 (1947).

Defendant's first point, saying that summary judgment procedure was inappropriate, is without merit.

Defendant's Point Two, in its first part, argues that specific performance is not a proper remedy because there exists an adequate remedy at law. This point is not well founded. Generally, 'specific performance of a contract concerning stock usually will not be decreed unless damages at law are clearly inadequate, but where justice demands it, a contract to sell stock will be specifically enforced.' *Baruch v. W. B. Haggerty, Inc.*, 137 Fla. 799, 188 So. 797 (1939). In Baruch, however, the court held that where the corporation was a closed one, and where none of the stock had ever been put on the market and had no readily ascertainable market value and where the stock had no fixed value and no par value, the buyer would be entitled to invoke the aid of equity to enforce a contract for sale of stock. Further, the court found the doctrine of mutuality of remedy would entitle the seller to specific performance; the Baruch case was discussed in *Jackson Land Co. v. Harbeson*, 153 So.2d 826, 827 (Fla.1963):

> '(Baruch) announced the rule that specific performance would not ordinarily be granted to enforce the transfer of stock unless the stock was of peculiar value, and could not be bought and sold in the market in which case it could not be readily replaced or the value easily ascertained. The court held that because of the need for mutuality of remedy a seller of stock could resort to a court of equity for relief against a prospective buyer who defaulted.'

In the *Jackson Land Co.* case, however, the Supreme Court held that, since the sellers had exercised their rights under a contractual acceleration clause providing for the return of the stock by the escrow agent, they were not entitled to specific performance of the stock purchase contract.

Under the facts in the instant case, the remedy of specific performance is proper under the holding in Baruch, *supra*, in that here the shares are in a close corporation with the stock not having a readily ascertainable market value.

The second phase of defendant's Point Two deals with impossibility of performance and we think it has merit so as to cause reversal. The problem with ordering specific performance of the contract is that several of the terms in the agreement cannot be enforced by the court because they involve performance by a party not involved in this litigation.

In addition to the mentioned transfer and sale of one-half of the stock for a price of $50,000, the agreement contained certain provisos, which are necessarily not within the power of plaintiff-seller to control or deliver. The will and disposition of Jane Parks is the key to this performance. Further, if the court requires plaintiff only to perform those portions of the agreement which he can deliver, the court will be impermissibly making a new and different contract for the parties. *See* 29A Fla.Jur., Specific Performance § 155 (1967).

Those critical provisions are:

> "3. Parks agrees, upon receipt of payment of $1,000.00 as provided in Paragraph 2(a) above to resign as a Director and President of Company and in his place, *Camp will be elected as Director and President of Company. Camp agrees to continue working full time with Company as long as any part of his obligation to Parks remains unpaid.* (Emphasis supplied.)
>
> * * *
>
> '5. *Company agrees not to transfer the stock purchased by Camp or to issue any further stock in Company until such time as Parks has been paid in full*. (Emphasis supplied.)
>
> '6. *... Company represents that it has no claims against Parks and waives, releases, and discharged Parks of and from any liability.* (Emphasis supplied.)
>
> '7. *Company agrees to transfer to Parks, at no cost to Parks, the 1960 Piper Tri-Pacer presently registered in name of Company and the 1970 Chevrolet Impala two-door hard-top registered in the name of Company*. (Emphasis supplied.)
>
> * * *
>
> '9. The parties agree that, in the event Camp is in default under the *terms of this agreement for ninety* days or more, that *Parks*, at his option, *may*:
>
> (a) With the consent of Camp, Become the chief operating officer of Company for such periods of time as Camp and Parks shall agree at a weekly salary of $200.00 To be paid by Company in addition to sums required to (sentence unfinished on record copy). (Emphasis supplied.)

* * *

‘11. *Parks represents that he is currently drawing $200.00 a week in salary from Company as President and will continue to draw the same until such time as he ceases to be President under the terms of the agreement. At such time as Parks ceases to be President of the Company, Parks shall become the owner of one-half of all cash and bank accounts and accounts receivable of Company. One-half of all cash and bank accounts of the Company will be immediately turned over to Parks and one-half of collections on all accounts receivable, standing on the books of Company as of such date shall be paid to Parks as the same are collected by Company. Company will collect said accounts without cost to Parks*. (Emphasis supplied.)

‘12. *Company books and records shall be available for inspection by Parks or his agents at all reasonable times*.” (Emphasis supplied.)

Defendant, because of this situation, argues against specific enforcement on the ground of impossibility of performance.

> “’Impossibility of performance' refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform. ‘Frustration of purpose’ refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party.' *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (2d DCA Fla.1965).

See, *Con-Dev of Vero Beach, Inc. v. Casano*, 272 So.2d 203 (4th DCA Fla.1973), in which the court held:

> “Specific performance of a contract for the sale of realty will not be decreed against the vendor (therefore, the party) who is unable to comply with the terms of his agreement . . . The defense of Impossibility in this instance Would constitute an avoidance or affirmative defense to specific performance under F.R.C.P. 1.140, and therefore should not have been stricken.” (Emphasis supplied.) *Id*. at 206.

See also Nat'l Industrial Bank of Miami v. Forbes, 270 So.2d 426 (4th DCA Fla.1972). *See,* 29 Fla.Jur., *Specific Performance* § 51 (1967).

Plaintiff suggests that defendant is barred from asserting this defense because of the holding in Shore Investment Co. v. Hotel Trinidad, *supra*. In the Shore case an appellee leased certain property for the purpose of building a new hotel. However, the permit for the construction could not be obtained and the lessor sued for possession. This was not a suit for specific performance and performance of impossible requirements were not adjudged. The court stated:

> "We do not think such a defense (impossibility) was available to him (Lessee). Knowledge of the situation was well known or could have been known by casual inquiry and the dominant rule seems to be that where performance of a contract becomes impossible after it is executed, or if knowledge of the facts making performance impossible were available to the promisor, he cannot invoke them as a defense to performance. The facts offered as a defense here were easily available to respondent. 29 So.2d at 697.

Thus, Shore is somewhat similar to the situation involved here; however, the court did not attempt to specifically enforce the building of the hotel. If, for example, the contract had called for the construction of the new hotel as payment for the lease, the court could not specifically enforce that condition, since the performance was in the hands of a party not involved in the action. Therefore, damages, not specific enforcement of the contract terms, would be called for. Here, impossibility of performance is a proper defense to specific performance; it may not be a defense to a suit for damages, as the facts here are such that the failure to obtain the consent of Jane Parks, prior to entering into the contract which contained terms for which her consent was necessary, was the fault not only of plaintiff, but also of defendant. *See*, *Caidin v. Poley*, 313 So.2d 88 (4th DCA Fla.1975).

The terms of the agreement requiring participation and performance by Jane Parks and the Company are so entwined and of such importance as to render the agreement impossible of specific performance. This being true, the appealed order is in error and must be reversed and the cause remanded with respectful instructions to allow plaintiff to seek money damages for breach of contract. We, of course, express no opinion as to the merits of any claim that plaintiff may make.

Reversed and remanded for further proceedings consistent herewith.

Reversed and remanded.

OWEN, C.J., and MAGER, J., concur.

3. Commercial Impracticability

In sale-of-goods cases, an inability to timely deliver goods by the seller may be excused where a basic assumption concerning a contract is made impracticable. There are certain duties that a seller needs to satisfy, such as allocating a portion of the thing under contract amongst several buyers all of whose contracts are unfulfilled.

U.C.C. § 2-615 Excuse by Failure of Presupposed Conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.[60]

Restatement (Second) § 261 Discharge by Supervening Impracticability

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

BARNACLE BILL'S SEAFOOD GALLEY, INC. v. FORD

60

District Court of Appeal of Florida, First District, 1984

453 So. 2d 165

BOOTH, Judge.

This cause is before us on appeal from a final judgment canceling a lease agreement, and on cross appeal from a summary judgment based on res judicata.

The Okaloosa Island Authority [Footnote omitted] leased two lots to Larry R. Ford for 99 years. In 1972, Ford subleased the two lots, along with the building on them, to Mitchel Benaquis and Ruth Puhalla Kondrat, who in turn assigned the sublease to Barnacle Bill's Seafood Galley, Inc. The relevant terms of the lease are as follows: (1) Barnacle Bill's was to pay rent of $600 per month to Ford for ten years; (2) Barnacle Bill's had the option to renew the lease for another ten years at $750 per month; (3) two percent of Barnacle Bill's gross revenue from operation of its restaurant on the property was to be paid directly to the Okaloosa Island Authority each month.

The sublease from Ford, as originally drafted, required the two percent assessment on the gross revenues from the operation of the restaurant to be paid directly to Ford. However, the Island Authority would not approve the sublease unless the two percent assessment was made payable directly to the Island Authority, and the change was accordingly made in the lease to obtain the Island Authority's approval.

On June 23, 1975, the Okaloosa Island Authority was abolished, and all its powers, duties, and functions were given to the County Commissioners of Okaloosa County. Chapter 75–456, Laws of Florida. The County Commissioners were not given the power to collect the two percent assessment on gross revenue, and Barnacle Bill's ceased paying the assessment. The County did, however, impose an ad valorem tax on the leased property in 1975. Barnacle Bill's did not pay this tax, nor did Ford. [Footnote omitted] Years of litigation determined that the County Commission had the power to impose such a tax.

Also in 1975, Barnacle Bill's filed suit asking that Ford be required, pursuant to the lease, to repair the leased building, which was damaged by a storm. Ford filed a counterclaim for cancellation of the lease, in part alleging that Barnacle Bill's breached the lease agreement by discontinuing payment of the two percent assessment and by not paying the ad valorem tax. This part of the counterclaim was dismissed on Barnacle Bill's motion, which asserted that Ford was not the proper party to claim unjust enrichment resulting from non-payment of assessment and taxes. Ford subsequently appealed all issues in the case except dismissal of the counterclaim, and the First District Court of

Appeal affirmed. *Ford v. Barnacle Bill's Seafood Galley, Inc.,* 350 So.2d 838 (Fla. 1st DCA 1977).

On April 20, 1981, Ford brought this action for declaratory relief, again pleading in part that the non-payment of the assessment/tax was a breach, and also the lease was unjust and unfair. Barnacle Bill's contended it was not liable for the two percent assessment because the Okaloosa Island Authority no longer existed and was not liable for ad valorem taxes since this was not provided under the lease. Barnacle Bill's denies the lease was unjust and unfair.

* * *

[S]ummary judgment based on res judicata should not have been granted. There being no clear and convincing evidence that the merits of the former case were considered in the dismissal of Ford's counterclaim, the 1976 judgment relied on as a basis for the res judicata ruling was not a decision on the merits. Res judicata therefore does not apply.

Accordingly, both the final judgment and the summary judgment entered below are reversed. Both parties agree that entry of the summary judgment based on res judicata precluded consideration of other matters asserted by Ford. Therefore, on remand, the trial court may consider reformation of the lease or cancellation of the renewal option based on an alleged breach of the agreement. The trial court, based on appropriate findings, may reform the lease and under a theory of partial impossibility or partial impracticability[6] resulting from the abolition of the Island Authority, may order payment to Ford of the percentage assessment formerly payable by Barnacle Bill's to the Island Authority or such other relief as may be appropriate.

Accordingly, the cause is reversed and remanded.

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[6] *Restatement of Contracts* § 463 (1932); *Restatement (Second) of Contracts* § 270 (1979):

Partial Impracticability

Where only part of an obligor's performance is impracticable, his duty to render the remaining part is unaffected if

(a) it is still practicable for him to render performance that is substantial, taking account of any reasonable substitute performance that he is under a duty to render; or

(b) the obligee, within a reasonable time, agrees to render any remaining performance in full and to allow the obligor to retain any performance that has already been rendered.

....

Illustrations:

....

2. A contracts with B to deliver all of B's requirements of milk during the following year at B's loading platform at 200 Lincoln Street. Before A begins performance, the loading platform is accidentally destroyed by fire, but B has an equally suitable platform across the street at 201 Lincoln Street. Neither A's nor B's duties are affected, except that A is to deliver and B is to accept milk at 201 Lincoln Street.

3. A contracts to sell and B to buy a quantity of wheat “f.o.b. Kosmos Streamer at Seattle.” Before delivery, an outbreak of war makes Kosmos line ships unavailable at Seattle, but delivery on that line's loading dock remains possible and is a commercially reasonable substitute. Neither A's nor B's duties are affected, except that A is to deliver and B is to accept wheat at the Kosmos line's loading dock. B may have a claim under the rules stated in § 272(1) based on A's failure to load the wheat for which he has been paid.

Note

Outlining of the requirements to establish the impractability defense can be gleaned from the Restatement (Second) Contracts, but versions can also be found in a variety of sources. Where these “differ,” it is usually something immaterial, such as breaking down a compound requirement into two “elements,” e.g. a “substantial breach” could be broken down into 1) a breach; that 2) is substantial. Typical outlining of this defense includes three elements: 1) and unforeseen contingency; 2) the risk of the contingency was not assumed by or allocated to one of the parties; and 3) an increase in cost of performance that is far beyond what either party anticipated.

CMM Approach: Perhaps as a quick way to remember the distinction between acts of God, impossibility, and frustration of purpose would be to recall “tornado, bankruptcy, and rejection of employment application.” A tornado destroying a vehicle makes it impossible to buy. The buyer’s going bankrupt could very well make it impossible for the buyer to complete the purchase a vehicle pursuant to contact. Not receiving an offer of employment that the parties both knew about might frustrate the purpose of a contract to purchase a vehicle, if it takes away the reason behind needing that vehicle.

Problem 26-3

Perhaps because facts such as ‘who knew what’ and whether a party bore the risk of something are factual, are these questions of fact rather than of Law?

The following are Florida Standard Jury Instructions in Contract and Business Cases, promulgated by The Florida Supreme Court Committee on Standard Jury Instructions in Contract and Business Cases, available at http://www.floridasupremecourt.org/contract-business-jury-instructions/instructions.shtml. These are great sources of "black letter" elements. (Not reproduced are certain notes and case sources from which the defenses derive). Try to categorize them as pre- and post-formation defenses. Which defenses that have been addressed in Chapters 24-26 are missing from the list? Why? (Similar rules are likely to exist in other jurisdictions.)

416.25 AFFIRMATIVE DEFENSE – MUTUAL MISTAKE OF FACT

(Defendant) claims that [he] [she] [it] should be able to set aside the contract because the parties were mistaken about (insert description of mistake). To establish this defense, (defendant) must prove the following:

38. The parties were mistaken about (insert description of mistake); and

39. (Defendant) did not bear the risk of mistake. A party bears the risk of a mistake when

[the parties' agreement assigned the risk to [him] [her] [it]]*

[or]

[[he] [she] [it] was aware, at the time the contract was made, that [he] [she] [it] had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract].**

** The court should give the first option only if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.*

***The court should give the second option only if there is competent, substantial evidence that, at the time the contract was made, the defendant had only limited knowledge with respect to the facts relating to the mistake but treated the limited knowledge as sufficient.*

416.26 AFFIRMATIVE DEFENSE – UNILATERAL MISTAKE OF FACT

(Defendant) claims that [he] [she] [it] should be able to set aside the contract because [he] [she] [it] was mistaken about (insert description of mistake). To establish this defense, (defendant) must prove all of the following:

28. (Defendant) was mistaken about (insert description of mistake) at the time the parties made the contract;

29. [The effect of the mistake is such that enforcement of the contract would be unconscionable]

[or]

[(Claimant) had reason to know of the mistake or [he] [she] [it] caused the mistake.]

and

30. (Defendant) did not bear the risk of mistake. A party bears the risk of a mistake when

[the parties' agreement assigned the risk to [him] [her] [it]]*

[or]

[[he] [she] [it] was aware, at the time the contract was made, that [he] [she] [it] had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract].**

** The court should give the first option only if the court finds that the contract is ambiguous regarding whether the contract assigns the risk to the defendant.*

***The court should give the second option only if there is competent, substantial evidence that, at the time the contract was made, the defendant had only limited knowledge with respect to the facts relating to the mistake but treated the limited knowledge as sufficient.*

416.27 AFFIRMATIVE DEFENSE – UNDUE INFLUENCE

(Defendant) claims that [he] [she] [it] should be able to set aside the contract because (claimant) unfairly pressured [him] [her] [it] into agreeing to the contract. To establish this defense, (defendant) must prove both of the following:

25. (Claimant) used [a relationship of trust and confidence] [or] [(defendant)'s weakness of mind] [or] [(defendant)'s needs or distress] to control, persuade, or pressure (defendant) into agreeing to the contract; and

26. (Defendant) would not otherwise have voluntarily agreed to the contract.

416.28 AFFIRMATIVE DEFENSE – FRAUD

To establish the defense of fraud, (defendant) must prove all of the following:

16. (Claimant) represented that (insert alleged fraudulent statement) and that representation was material to the transaction;

17. (Claimant) knew that the representation was false;

18. (Claimant) made the representation to persuade (defendant) to agree to the contract;

19. (Defendant) relied on the representation; and

20. (Defendant) would not have agreed to the contract if [he] [she] [it] had known that the representation was false.

On this defense, (Defendant) may rely on a false statement, even though its falsity could have been discovered if (defendant) had made an investigation. However, (defendant) may not rely on a false statement if [he] [she] [it] knew it was false or its falsity was obvious to [him] [her] [it]. In making this determination, you should consider the totality of the circumstances surrounding the type of information transmitted, the nature of the communication between the parties, and the relative positions of the parties.

416.29 AFFIRMATIVE DEFENSE—NEGLIGENT MISREPRESENTATION

The committee recognizes that some authority exists suggesting that negligent misrepresentation can be asserted as an affirmative defense to a breach of contract claim. *See Rocky Creek Retirement Properties, Inc. v. The Estate of Virginia B. Fox,* 19 So.3d 1105, 1110 (Fla. 2d DCA 2009). However, the law supporting this defense has not been sufficiently developed to enable the committee to propose an instruction on this defense. Pending further development in the law, the committee takes no position on this issue.

416.30 AFFIRMATIVE DEFENSE – WAIVER

(Defendant) claims that [he] [she] [it] did not have to (insert description of performance) because (claimant) gave up [his] [her] [its] right to have (defendant) perform [this] [these] obligation[s]. This is called a “waiver.”

To establish this defense, (defendant) must prove all of the following:

9. (Claimant's) right to have (defendant) (insert description of performance) actually existed;

10. (Claimant) knew or should have known [he] [she] [it] had the right to have (defendant) (insert description of performance); and

11. (Claimant) freely and intentionally gave up [his] [her] [its] right to have (defendant) (insert description of performance).

A waiver may be oral or written or may arise from conduct which shows that (claimant) gave up that right.

If (defendant) proves that (claimant) gave up [his] [her] [its] right to have (defendant) (insert description of performance), then (defendant) was not required to perform [this] [these] obligation[s].

416.31 AFFIRMATIVE DEFENSE – NOVATION

To establish the defense of novation, (defendant) must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

416.32 AFFIRMATIVE DEFENSE – STATUTE OF LIMITATIONS

On the defense of statute of limitations, the issue for you to decide is whether (claimant) filed [his] [her] [its] claim (describe claim as to which statute of limitations defense has been raised) within the time set by law.

To establish this defense, (defendant) must prove that any breach of contract, if one in fact occurred, occurred before (insert date four or five years before date of filing suit).

416.33 AFFIRMATIVE DEFENSE – EQUITABLE ESTOPPEL

(Defendant) has raised the defense of equitable estoppel. To establish this defense, (defendant) must prove all of the following:

(b)[(Claimant) took action by (describe material action)]
[(Claimant) spoke about (describe material fact)]
[(Claimant) concealed or was silent about (describe material fact) at a time when [he] [she] [it] knew of [that fact] [those facts]];

(c) (Defendant) relied in good faith upon (claimant's) [action] [words] [inaction] [silence]; and

(d) (Defendant's) reliance on (claimant's) [action] [words] [inaction] [silence] caused (defendant) to change [his] [her] [its] position for the worse.

416.35 AFFIRMATIVE DEFENSE – JUDICIAL ESTOPPEL

The committee has not drafted an instruction for the affirmative defense of judicial estoppel because judicial estoppel is an equitable doctrine which a court is to determine. *See Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061, 1066 (Fla. 2001) ("Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings." (citation omitted).

416.36 AFFIRMATIVE DEFENSE – RATIFICATION

(Defendant) has raised the defense of ratification. To establish this defense, (defendant) must prove all of the following:

4. (Defendant) performed [an act] [a transaction] which breached the contract;

5. (Claimant) knew of the [act] [transaction];

6. (Claimant) knew that [he] [she] [it] could reject the contract because of the [act] [transaction]; and

7. (Claimant) [accepted the [act] [transaction]] [expressed [his] [her] [its] intention to accept the [act] [transaction]].

IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER 26

(60) The similarities and differences between common law defenses and those applied to sale-of-goods cases (this may entail understanding of Chapters 24 and 25 as well)

(61) The differences between *Acts of God*, *Impossibility*, and *Frustration of Purpose* in order to know when to apply one or another as a possible defense to enforcement

SUGGESTED EXERCISE(S)

48. Look up the three cases cited in the *Mailloux* excerpt above and compare the requirements of "Act of God" in *Fla. Power Corp.*, "impossibility" in *Am. Aviation, Inc.*, and "frustration of purpose" in *Equitrac Corp.* Are you able to identify any distinctions between them? Or is it clear from the other case excerpts?

49. Using the common elements of the *frustration of purpose* doctrine detailed in this Chapter, come up with at least two different scenarios where the risk was not borne by the party asserting the defense.

GLOSSARY OF KEY TERMS AND CONCEPTS

The following terms represent the foundational concepts of Florida contract law as covered in this casebook. Citations are to Florida authorities unless otherwise noted. Cross-references to the Restatement (Second) of Contracts and the Uniform Commercial Code are included where applicable.

A

Acceptance — The offeree's unequivocal assent to the terms of an offer, creating a binding contract. Under common law, must mirror the offer exactly (mirror image rule); under UCC § 2-207, a definite expression of acceptance operates as acceptance even with additional or different terms.

Accord and Satisfaction — A method of discharging a contract obligation whereby the parties agree (accord) to accept a different performance, and that performance is completed (satisfaction). Distinguished from modification in that it resolves a disputed or unliquidated claim.

Anticipatory Repudiation — A party's unequivocal statement or conduct before performance is due indicating that it will not perform its contractual obligations, entitling the non-breaching party to treat the contract as immediately breached and sue at once.

Assignment — The transfer of a contractual right (not a duty) from the assignor to an assignee. The assigned right must be a present transfer; the obligor must perform for the assignee after notice. Anti-assignment clauses are generally enforced but strictly construed.

B

Battle of the Forms — The UCC § 2-207 problem arising when buyer and seller exchange forms with conflicting terms. Under the 'knockout rule,' conflicting terms cancel each other out and are replaced by UCC gap-fillers; additional terms in the acceptance become part of the contract unless they materially alter it (between merchants).

Bilateral Contract — A contract formed by the exchange of mutual promises — each party is both promisor and promisee. Contrast with unilateral contract, where one party performs an act in exchange for the other party's promise.

Breach of Contract — A party's failure without legal excuse to perform any promise that forms the whole or part of a contract. May be material (going to the essence) or immaterial; only material breach excuses the non-breaching party's performance.

C

Capacity — The legal ability to enter into a binding contract. Minors (under 18), persons adjudicated incompetent, and persons lacking mental capacity may disaffirm contracts. Contracts by minors are voidable, not void.

Condition — An event, not certain to occur, that must occur before a duty to perform arises (condition precedent) or that discharges an existing duty (condition subsequent). Conditions are strictly enforced unless waived, excused, or subject to forfeiture prevention.

Condition Precedent — An event that must occur before a contractual duty to perform becomes operative. Failure of a condition precedent prevents the duty from arising but is not a breach by either party.

Condition Subsequent — An event whose occurrence discharges a duty that has already arisen. Less common than conditions precedent; shifts the burden of pleading to the party whose duty is discharged.

Concurrent Conditions — Conditions that are mutually dependent, with each party's performance conditioned on the other's simultaneous tender. Common in real estate closings and exchanges of goods for money.

Consideration — A bargained-for exchange that induces a promise; may be an act, a forbearance, or a return promise. Must have legal value (benefit to promisor or detriment to promisee). Past consideration and illusory promises do not qualify.

Course of Dealing — A sequence of previous conduct between the parties to a particular transaction, prior to the current contract, which may be used to interpret that contract's terms. See UCC § 1-303(b); Fla. Stat. § 671.303(2).

Course of Performance — A sequence of conduct after contract formation where the same parties have a contract calling for repeated performances and one party performs without objection. Strong evidence of the meaning the parties intended. See UCC § 1-303(a).

D

Damages (Expectation) — The primary remedy for breach of contract: places the non-breaching party in the position it would have occupied had the contract been performed. Includes direct (general) damages and consequential (special) damages.

Damages (Reliance) — Damages that restore the non-breaching party to the position it was in before the contract was made, compensating for out-of-pocket expenditures made in reliance on the contract. An alternative to expectation damages.

Damages (Restitution/Quantum Meruit) — Damages designed to prevent unjust enrichment by restoring to the plaintiff the value of the benefit conferred on the defendant. Available in quasi-contract and as an alternative measure when expectation damages are uncertain.

Delegation — The transfer of a contractual duty to a third party (the delegate), who agrees to perform. The delegating party remains secondarily liable unless a novation is effected. Non-delegable duties include those requiring unique personal skill or involving a material change in the obligee's expectation.

Duress — A defense to contract formation or modification based on improper threats that leave the victim with no reasonable alternative but to agree. Economic duress requires proof that the threat was wrongful and that no adequate legal remedy was available.

E

Economic Loss Rule — Doctrine (significantly narrowed in Florida by Tiara Condo. Ass'n v. Marsh & McLennan, 110 So.3d 399 (Fla. 2013)) limiting tort recovery where the claim is solely for economic loss arising from a contractual relationship. Post-Tiara, the rule applies primarily in the products liability context.

Estoppel (Equitable) — A doctrine preventing a party from asserting a position inconsistent with a prior representation when another party has reasonably relied on that representation to their detriment. Operates to prevent forfeiture of rights and waiver of conditions.

Expectation Interest — See Damages (Expectation). The goal of contract damages under both common law and UCC § 1-106: to put the aggrieved party in as good a position as if the contract had been fully performed.

F

Foreseeability — The Hadley v. Baxendale limitation on consequential damages: damages are recoverable only if, at the time of contracting, the breaching party had reason to know that the loss was a probable result of the breach.

Frustration of Purpose — A post-formation defense excusing performance when the principal purpose of the contract has been substantially frustrated by an unforeseen supervening event, even though performance remains physically possible. Requires that the risk not have been assumed.

Four Corners Rule — The rule of contract interpretation requiring courts to determine the parties' intent from the language of the contract itself, without resort to extrinsic evidence, when the contract is unambiguous on its face.

G

Gap-Fillers (UCC) — Default terms supplied by Articles 1 and 2 of the UCC when the parties' agreement is silent on a particular matter, including open price (§ 2-305), delivery terms (§ 2-308), time for performance (§ 2-309), and payment terms (§ 2-310).

Good Faith — An implied duty in every contract under both common law and UCC § 1-304 (Fla. Stat. § 671.304) to act with honesty in fact and, for merchants, in observance of reasonable commercial standards of fair dealing. Cannot be used to override express contract terms but fills gaps and prevents opportunistic behavior.

I

Illegality — A defense rendering a contract void or unenforceable when its purpose or subject matter violates a statute, regulation, or public policy. Contracts malum in se (evil in themselves) are void; those malum prohibitum (prohibited by statute) may be void or merely unenforceable depending on the legislative purpose.

Illusory Promise — A promise that, as stated, makes performance entirely optional for the promisor ('I will if I want to'). Illusory promises lack mutuality and therefore do not constitute consideration.

Implied-in-Fact Contract — A contract inferred from the parties' conduct rather than from explicit words. Enforceable as an actual contract; distinguished from quasi-contract (implied-in-law) by the existence of genuine assent.

Implied-in-Law Contract (Quasi-Contract) — Not a true contract but a legal fiction imposing an obligation to prevent unjust enrichment. The plaintiff must show a benefit conferred, the defendant's knowledge and acceptance of the benefit, and that retention without compensation would be inequitable.

Impossibility — A post-formation defense excusing performance when, after contract formation, performance becomes objectively impossible due to a supervening event (e.g., destruction of the subject matter, death of a person whose personal services are required) that neither party assumed the risk of.

Integration (Complete vs. Partial) — A writing is completely integrated when it is the final and exclusive expression of the parties' agreement; partially integrated when final but not exclusive. A completely integrated agreement bars all extrinsic evidence of prior or contemporaneous terms; a partially integrated agreement bars only contradictory extrinsic evidence.

L

Liquidated Damages — A damages clause fixing the amount of damages in advance. Enforceable in Florida if (1) damages were difficult to estimate at the time of contracting and (2) the agreed amount is a reasonable forecast of just compensation. A term fixing unreasonably large damages is void as a penalty under UCC § 2-718.

Lost Volume Seller — A seller who, after the buyer's breach, resells the goods but could have made both sales. Such a seller's damages under UCC § 2-708(2) are the profit that would have been earned on the contract, since the resale does not fully compensate for the lost volume.

M

Mailbox Rule — Under Morrison v. Thoelke, 155 So.2d 889 (Fla. 2d DCA 1963), acceptance is effective upon dispatch (when mailed), not upon receipt — provided the medium used is reasonable. Risk of loss in transmission falls on the offeror.

Material Breach — A breach that is so substantial as to defeat the purpose of the contract, justifying the non-breaching party in treating the contract as terminated and suing immediately for total breach. Factors include extent of non-performance, likelihood of cure, adequacy of compensation, and hardship of forfeiture.

Merger Clause (Integration Clause) — A contractual provision stating that the written agreement constitutes the entire agreement of the parties, superseding all prior negotiations and agreements. Strongly (though not conclusively) evidences complete integration for parol evidence purposes.

Mirror Image Rule — The common law rule requiring that an acceptance match the offer exactly. Any addition or qualification in the purported acceptance constitutes a counteroffer. Modified significantly by UCC § 2-207 for sale-of-goods contracts.

Misrepresentation — A false assertion of fact that induces a party to contract. Fraudulent misrepresentation (made knowingly or recklessly) entitles the deceived party to rescission and tort damages. Innocent misrepresentation entitles the party only to rescission.

Mistake (Mutual) — Both parties contract under a mistaken belief about a material fact existing at the time of contracting. The adversely affected party may avoid the

contract unless it bears the risk of the mistake under the contract or as a matter of law.

Mistake (Unilateral) — Only one party is mistaken about a material fact. Voidable only if the other party knew or had reason to know of the mistake, or if enforcement would be unconscionable.

Mitigation of Damages — The duty of the non-breaching party to take reasonable steps to minimize its losses following a breach. Failure to mitigate reduces the recovery by the amount the loss could have been avoided through reasonable effort.

N

Novation — The substitution of a new party or obligation for an existing one, with the consent of all parties, discharging the original obligor from liability. Requires: (1) existing valid obligation, (2) agreement of all parties, (3) extinguishment of the old obligation, and (4) a valid new obligation. See Sans Souci v. Division of Florida Land Sales, 421 So.2d 623 (Fla. 1st DCA 1982).

O

Offer — A manifestation of willingness to enter into a bargain that justifies another person in understanding that assent to the bargain is invited. Must be sufficiently definite as to parties, subject matter, price, and time of performance to be an offer rather than an invitation to deal.

P

Parol Evidence Rule — A substantive rule of contract law (not merely evidence) that bars extrinsic evidence of prior or contemporaneous agreements offered to contradict or vary the terms of a completely integrated written agreement. Exceptions include fraud, mistake, condition precedent to integration, ambiguity, and collateral agreements.

Perfect Tender Rule — Under UCC § 2-601, a buyer may reject goods if they fail in any respect to conform to the contract. Subject to the seller's right to cure (§ 2-508) and, in installment contracts, the substantial impairment test.

Plain Meaning Rule — When a contract is clear and unambiguous on its face, the court gives the words their ordinary meaning without resort to extrinsic evidence. Whether a contract is ambiguous is a question of law reviewed de novo. See Caulkins Indiantown Citrus Co. v. Nevins Fruit Co., 831 So.2d 727 (Fla. 4th DCA 2002).

Promissory Estoppel — A doctrine enforcing a promise that lacks consideration when (1) the promisor should reasonably expect the promise to induce action or forbearance, (2) the promise does induce such action or forbearance, and (3) injustice can only be avoided by enforcement. See Restatement (Second) of Contracts § 90.

Q

Quantum Meruit — See Damages (Restitution/Quantum Meruit). Recovery for the reasonable value of services rendered under an implied contract or quasi-contract theory.

R

Reformation — An equitable remedy correcting a written contract to conform to the parties' true agreement when the writing fails to express it due to mutual mistake or fraudulent misrepresentation.

Rejection (UCC) — A buyer's refusal to accept tendered goods that fail to conform to the contract. Must occur within a reasonable time after delivery and be accompanied by reasonable notification. After rejection, the buyer must not exercise ownership acts over the goods.

Rescission — Cancellation of a contract, restoring the parties to their pre-contract positions. Available for mutual mistake, fraud, misrepresentation, duress, undue influence, or failure of consideration. Requires prompt action upon discovery of the grounds.

Revocation — The offeror's withdrawal of an offer before acceptance. Effective upon communication to the offeree. An option contract (supported by consideration or firm offer under UCC § 2-205) cannot be revoked during the stated period.

Risk of Loss (UCC) — Allocation of the risk that goods will be damaged or destroyed during the sales transaction. Under UCC §§ 2-509 and 2-510, risk passes to the buyer upon delivery to the carrier (shipment contract) or upon tender at destination (destination contract), subject to modification by the parties' agreement.

S

Specific Performance — An equitable remedy ordering a party to perform its contractual obligations, available when monetary damages are inadequate (e.g., contracts for unique goods, real property, or rare services). Courts balance the hardship to the defendant against the benefit to the plaintiff.

Statute of Frauds — Requires certain contracts to be evidenced by a signed writing to be enforceable, including contracts for the sale of land, contracts not performable within one year, executor's promises, surety agreements, and UCC contracts for goods of $500 or more. Florida's version is found at Fla. Stat. § 725.01 and UCC § 2-201. Under Browning v. Poirier, 165 So.3d 663 (Fla. 2015), an oral contract not to be performed within one year does not fall within the Statute if performance within one year is possible.

Substantial Performance — A doctrine allowing a party who has substantially (though not perfectly) performed its obligations to recover the contract price less any offset for the deficiency. Prevents forfeiture when the breach is immaterial. Not applicable when performance is expressly conditioned on strict compliance.

Subrogation — The substitution of one party in place of another with respect to a claim or right. In insurance contracts, the insurer who pays a loss steps into the shoes of the insured to pursue the insured's claim against a third party.

T

Third-Party Beneficiary — A non-party to a contract who has rights under it. An intended beneficiary (donee or creditor) may enforce the contract directly once rights vest. An incidental beneficiary — one who benefits only indirectly — has no enforceable rights.

U

UCC (Uniform Commercial Code) — A uniform act governing commercial transactions in the United States. Article 1 contains general provisions; Article 2 governs contracts for the sale of goods. Florida has adopted both, at Fla. Stat. chapters 671 (Art. 1) and 672 (Art. 2). The UCC generally displaces common law where it conflicts.

Unconscionability — A defense rendering a contract or clause unenforceable when it is both procedurally unconscionable (unfair bargaining process — unequal bargaining power, lack of meaningful choice) and substantively unconscionable (unfairly oppressive terms). Under UCC § 2-302 and common law, courts may refuse to enforce the contract, excise the offending clause, or limit its application.

Undue Influence — Improper persuasion that overcomes the free will of a party, short of the direct compulsion required for duress. Common in confidential or fiduciary relationships. Renders the contract voidable by the influenced party.

V

Void Contract — A purported contract that has no legal effect from its inception (ab initio) because it lacks an essential element or violates law or public policy. Neither party can enforce a void contract.

Voidable Contract — A contract that is valid and enforceable unless and until the party with the power of avoidance elects to disaffirm it. Common grounds include infancy, incapacity, fraud, duress, and unilateral mistake.

W

Waiver — The voluntary and intentional relinquishment of a known right. A party may waive a contract condition by conduct inconsistent with insisting on its performance. Unlike modification, waiver does not require consideration and may be retracted with reasonable notice unless the other party has relied on it.

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